CHARGES AGAINST LEBBEUS R. WILFLEY, JUDGE OF THE UNITED STATES COURT FOR CHINA, AND PETITION FOR HIS REMOVAL FROM OFFICE.

To THEODORE ROOSEVELT,
President of the United States:

The undersigned, in his own behalf, and in behalf of various American citizens residents of Shanghai, China, presents the following charges against Lebbeus R. Wilfley, judge of the United States court for China, to wit:

FIRST CHARGE. That said Lebbeus R. Wilfley, while holding the office of judge of the United States court for China, and while acting in such capacity, was guilty of oppression and a gross misuse of his powers as judge of said court, in that he, without cause, maliciously and contrary to their rights as citizens of the United States, prevented from practicing before the United States court for China the following lawyers, to wit: Francis M. Brooks, William I. Rogers, Cecil Holcomb, Edward H. Lamme, Harry L. Hart, Lorrin Andrews, duly admitted attorneys and counselors, holding certificates of admission to practice in the United States consular court in Shanghai, China, and members of the bar, regularly practicing in said consular court in China and in the courts of other countries held in Shanghai and in other parts of China for many years, and citizens of good standing in that community and in the communities of the United States where they had formerly lived; all of whom are also duly admitted members in good standing of various State and Federal courts of the United States, and some of whom were attorneys and counselors of the United States Supreme Court in good standing and in regular practice there; and refused to admit said attorneys to practice in his court upon motion and upon proof of good character as provided by the rules of the Supreme Court of the United States and its Federal courts; and thereby in effect disbarred the said attorneys and counselors from said United States court for China without any cause, without any charges being filed against them, without due process of law, and in defiance of the rules and practice of the United States Supreme Court and of the Federal and Territorial courts of the United States adopted and in force since the year 1790; and thereby ruined the said attorneys and counselors in standing and reputation in that community, deprived them of their livelihood, impoverished them, and left them citizens of the United States in a distant country without means of support for themselves, their wives, and children.

That for many years the consular courts in the United States have existed in Shanghai and in other parts of China, and members of the

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bar of the various State and Federal courts of the United States had been admitted to practice upon motion in accordance with the rules of the United States Supreme Court and the Federal and Territorial courts of the United States.

That said above-named attorneys and counselors had been in practice in said consular courts, some of them for many years, and had acquired a large clientage and large business; and from long and honorable practice had acquired a standing and reputation in that community for honesty, integrity, and ability as attorneys and counselors and as men.

That on the 30th day of June, 1906, an act was passed by the Congress of the United States creating a United States court for China.

That by the provisions of said act said United States court for China superseded the United States consular courts for China in all civil cases where the amount in controversy exceeded $500 and in all criminal cases where the punishment might exceed $100 or sixty days imprisonment, or both; and gave to the said United States court appellate jurisdiction over the judgments of the consular court and supervisory control over the actions of the consular courts relating to the estates of persons dying in China.

That said act provided that the practice of said court should be in accordance with the existing procedure of the consular courts in China, with power only to modify and supplement such rules and procedure; and further provided in all cases where treaties and law were deficient to give jurisdiction or furnish suitable remedies the common law and the law established by the decisions of the United States courts should be applied by said court in its decisions.

That by virtue of the said act of Congress, and by virtue of the said court of China superseding and taking the place and most of the jurisdiction of said consular courts, the attorneys and counselors of said consular courts became attorneys and counsellors of said United States court of China, and entitled to practice as attorneys and counselors therein.

That by virtue of said act, the consular courts of China were at once, upon the passage and approval of said act, deprived of their jurisdiction to entertain and try various cases that were then pending in the said consular courts; and said cases were at once transferred to the United States court of China, and after the 30th day of June, 1906, new cases of which said court had sole jurisdiction were commenced and held until the arrival of said Wilfley and organization of the said United States court of China on December 17, 1906; and that during all of said time from June 30, 1906, until December 17, 1906, the attorneys and counselors of the consular courts of China had appeared as attorneys and counselors for their clients in the cases so transferred to the United States court of China, and appeared on the morning of the first day when said court opened for the purpose of protecting the interests of their said clients. That to their surprise, they were informed in open court by said Lebbeus R. Wilfley, that he had just adopted rule 1, which he read, providing that no American lawyers would be permitted to appear and practice in his court until they had passed an examination in the following branches: Equity, evidence, pleading, contracts, torts, international law, criminal law, United States Revised Statutes affecting consular courts, and wills and administration of estates, and then announced that he would hold such examination one week from that date.

That unless this examination was passed at that time no attorneys of the United States, regardless of the certificates which they held, would be allowed to practice in the United States court for China.

That, on the contrary, attorneys of other nationalities would be allowed to practice in said courts upon presentation of certificates from their representative consuls, showing that they were qualified to practice in their own consular courts.

That your petitioner and other members of the American bar at Shanghai protested against this practice, asserting that they were already members of that court and that in any event, under the rules of the United States Supreme Court, they were entitled to be admitted upon motion and proof of good character.

That said Lebbeus R. Wilfley said that he would not permit anyone to practice before him until examined; that he had absolute power and could make any rules he saw fit, and that no American attorneys would be permitted to practice before him until they had passed this examination.

That said Lebbeus R. Wilfley refused to allow any extension of time to your petitioner or the other attorneys, in which they might finish their business then pending in the United States court for China; and that he refused to allow them to appear in said court in connection with their cases transferred from said United States court.

That while your petitioner and his partner, F. M. Brooks, having then pending in said court and in the consular courts some thirty or more important cases in which they had been retained and had received retainers, although they believed that the intentions of said Judge Wilfley were not honest, in order to try to protect the interests of their clients, took said examination.

That on the day before Christmas the said above-named attorneys and counselors, with two other members of the American bar of Shanghai, F. R. Jernigan and his partner, S. Fessenden, took said examination before said Wilfley.

That said Wilfley refused to allow them to take copies of the questions asked and the answers which they made.

That on the day after Christmas said Wilfley told them, when they called at the court pursuant to his direction, that the clerk of the court would inform them of the result of said examination.

That said attorneys and counselors then called upon one Hinckley, the clerk of the said court of the United States for China, and were informed that none of the said six attorneys and counselors had passed; that only Jernigan and Fessenden had passed, comprising one firm.

That your petitioners and others of said attorneys and counselors, whom Wilfley said did not pass the examination, called upon said Wilfley and asked him for copies of the questions and answers, so that they could ascertain whether they had answered the questions properly or not.

That said Wilfley refused to allow them to see any of said questions and answers; and thereafter, in defiance of the rules, procedure, and decision of all the Federal courts of the United States and Territories and of the Supreme Court of the United States, refused to allow them, or any of them, to practice in the said United States court for China, to the great loss and detriment of the clients of said attorneys and counselors, and to the disgrace and ruin of said attorneys and counselors themselves.

SECOND CHARGE: That said Lebbeus R. Wilfley, while holding the office of judge of the United States court for China, and acting in that capacity, by a gross misuse and abuse of his powers as such judge, while preventing the above-named attorneys and counselors, American citizens as set forth in the first charge, from earning their livelihood and practicing their profession in the United States court for China, allowed and permitted one Arthur L. Bassett, who was and is holding the office of district attorney for the United States court for China since the establishment of the said United States court for China, and who is a friend and protégé of said judge, to practice as such district attorney, and also privately as an attorney in civil cases in said court, without having passed a written examination in accordance with the rule 1 so adopted by the said Lebbeus R. Wilfley, and as said Lebbeus R. Wilfley had required of all members of the American bar.

That said Arthur L. Bassett was not a member of the American bar in Shanghai and had not been admitted to practice, as your petitioner is informed and believes, in a consular court of Shanghai, and is not and was not a member of the bar of the United States Supreme Court, nor of any Federal courts, so far as your petitioner has been able to ascertain.

That said Bassett said he owed his position as district attorney of the United States court for China to said Wilfley; and had been deputy under said Wilfley when said Wilfley held the position as attorney-general for the Philippine Islands.

That said Bassett came to Shanghai shortly before said Wilfley; and after said Wilfley's arrival, was with him and almost constantly in his company.

That said Bassett on his arrival said he intended to take up private practice and duties in the United States court for China; and that he intended to live with said Judge Wilfley upon his arrival at Shanghai.

THIRD CHARGE: That the said Lebbeus R. Wilfley, while holding the office of judge of the United States court for China, and while acting in such capacity, by spoken and written words and by his actions, has libeled and defamed your petitioner and the other members of the American bar named in charge 1, in that he maliciously and without cause charged them with being disreputable practitioners unworthy of practicing their profession and urging and securing the publication of articles in the public press containing such charges and libels, which he, the said Wilfley, knew to be false and untrue; and your petitioner alleges and believes that this was done for the purpose of discrediting your petitioner and said attorneys, so that they could not obtain relief from these wrongful and malicious actions of said Wilfley.

FOURTH CHARGE: That said Lebbeus R. Wilfley, while holding the office of judge of the United States court for China, and while acting in such capacity, was guilty of oppression and a gross misuse and abuse of his powers as judge of said court, in that after having been forced to admit your petitioner to practice as an attorney and counselor of his court he, the said Wilfley, threatened to disbar your petitioner as a practicing attorney and counselor of said United States court for China, and to ruin him in his good name and standing in his profession in Shanghai, unless your petitioner would accede to his, said Wilfley's, demand that your petitioner should dissolve his part-

nership with Francis M. Brooks, esq., a reputable attorney of the consular courts of China and of various State and Federal courts of the United States of America.

That upon your petitioner's refusal to accede to the demands of said Lebbeus R. Wilfley that your petitioner should dissolve his partnership with the said Francis M. Brooks, said Wilfley did commence proceedings before himself to disbar your petitioner from practicing in the United States court for China, on the pretended charge that your petitioner had committed perjury in an affidavit filed in the United States circuit court of appeals, upon an appeal from the United States court for China in the case of one S. R. Price, in which case said Price was, as your petitioner verily believes, wrongfully convicted of an assault with a deadly weapon, and in which case said Wilfley had unlawfully and unjustly refused to admit said Price to bail.

That said Wilfley well knew at the time that he admitted your petitioner to practice in said United States court for China, that your petitioner had made such affidavit, and that such disbarment proceedings against your petitioner were false and fraudulent, and intended by said Wilfley to oppress and ruin your petitioner because he had refused to dissolve his partnership with said Brooks.

That said Wilfley after making such charge against your petitioner and signing a citation, demanding that your petitioner should appear before the said Wilfley and show cause why your petitioner should not be disbarred, when your petitioner did appear and protest and object against the unfairness and injustice and groundlessness of such charge, and said judge at once overruled said objections; and when your petitioner thereupon filed an answer and demanded an immediate hearing, said Wilfley refused to grant a hearing and adjourned the case indefinitely for the alleged purpose of taking testimony in the State of California.

That said Wilfley well knew that said petitioner had committed no wrong or crime, or made any statement in his affidavit that was untrue; and was well aware of said affidavit and its contents long before he admitted your petitioner to practice in his said court; and that said pretended and false and fraudulent proceedings so brought by said Wilfley to disbar your petitioner were merely a tyrannical, unjust, and unlawful act of oppression and misuse and abuse of the powers of said judge, for the purpose of ruining and disgracing your petitioner in Shanghai, because your petitioner had refused to be subservient to the demands of said Wilfley and abandon his legal associate and partner, Francis M. Brooks, esq., who had studied law at Harvard Law School, was a lawyer of high reputation and standing, and a citizen of the United States of the best of character and reputation.

FIFTH CHARGE: That said Lebbeus R. Wilfley, while holding the office of judge of the United States court for China, and while acting in that capacity, has misused and abused the powers of said court and has willfully and knowingly held in disregard the obligations devolving upon him as judge, and has brought the United States court for China, its process and decisions, into odium and contempt among not only all right-thinking Americans, but all people of standing of every nationality in that country:

(1) In that on or about the 17th day of June, 1907, an order was issued by the said United States court for China commanding an

American citizen, one J. W. Winklebach, if found within the jurisdiction of the United States court for China, to appear before His Britannic Majesty's supreme court for China and Korea, and to submit to the jurisdiction of said court, contrary to the statutes of the United States whereby all American citizens sued have the right to be tried before their own court and from the decision thereof to take an appeal to the appellate court in California.

(2) That said Wilfley in the case of M. J. Connell & Co. against R. F. Daly issued an order requiring said R. F. Daly to appear on the 23d day of January, 1906, at 10 o'clock, to show cause why a receiver should not be appointed for the business that said Daly was conducting as restaurant keeper.

That said Daly was not served with said notice until 8.30 p. m. on January 22, 1907, and upon his appearing in court on January 23 and stating this fact, and that he had no time to obtain an attorney, and that no summons in any action had been served upon him, but merely an order to show cause why a receiver should not be appointed and asking that the matter might be adjourned until the afternoon or until next morning, when he, the said Daly, might have a chance to obtain legal advice, said judge refused to grant said adjournment and appointed as said receiver an employee of Mr. Connell's, the plaintiff, who was represented by Mr. Bassett, the district attorney, and said Daly was turned out of said business, although he denied that said Connell was a partner or had any interest in said property or business, and without receiving any trial or having any opportunity to obtain counsel to represent him the business of the said Daly was taken away from him and said Daly turned out on the streets penniless.

(3) That in June, 1906, one M. S. Friede, an American citizen, began a suit in the United States consular court for China, at Shanghai, against the firm of Getz Bros. & Co. (a corporation) for about $25,000.

That said Friede remained in Shanghai until about November, 1906, awaiting the hearing of his case, when he was obliged to leave for the United States to attend to his business there.

That after said Friede had left for the United States Arthur L. Bassett, the district attorney of said United States court for China, and who appeared as attorney and counsel for the defendants, Getz Bros. & Co., in the absence of Friede applied to said Wilfley, and said Wilfley set down said cause for January 7, 1907, against the protest of Mr. N. C. Home, counsel for said Friede, said Home being an English lawyer retained by said Friede.

That thereafter on the 7th day of January, 1907, said Judge Wilfley sitting without a jury took the testimony of defendants' witnesses, and at the request of the said Arthur L. Bassett, counsel for defendants, ordered a commission to be appointed to take the testimony of Mr. Friede and his witnesses in St. Louis, in the State of Missouri. That neither said Friede nor Getz Bros. & Co. resided or had any business agencies in St. Louis, and there was no reason for the selection of St. Louis as the place for taking testimony. Getz Bros. & Co. have their principal place of business in San Francisco, Cal., and said Friede, so far as your petitioner knows and has been informed, is engaged in business in Russia and China.

That said Friede did not appear in St. Louis, Mo., and that about the 7th day of July, 1907, said Wilfley, without any further notice to

Mr. Friede, on the testimony taken on the 7th day of January, 1907, in Mr. Friede's absence, rendered judgment, dismissing the complaint of said Friede and awarding the defendants, Getz Bros. & Co., the sum of $37,500 as against Friede, which judgment is in full force and effect.

SIXTH CHARGE: That said Lebbeus R. Wilfley while holding the office of judge of the United States court for China, and while acting in that capacity, maliciously and contrary to law, refused S. R. Price, an American citizen entitled to protection by the laws of his country, the right to bail, pending his appeal from conviction before said Wilfley without a jury, on a charge of assault. That said Wilfley committed said Price to jail unjustly and unlawfully; and unjustly and unlawfully refused to accept bail for said Price, pending said appeal; and that said Wilfley neglected to obey the mandate of the United States circuit court of appeals for the ninth circuit, directing him to release said Price upon bail, until compelled thereto by a second and peremptory order of said court reaffirming its former order.

That said Price was late sergeant of the First U. S. Volunteer Cavalry, and a veteran of the Spanish war, and a citizen of the United States sojourning in Shanghai, and was charged with the crime of assault with a deadly weapon.

That the evidence showed that said Price had pointed an unloaded weapon at a person who was attacking him with a large carving knife, because said Price was protecting a lady from insult.

That said Price was defended by an Italian lawyer, as the American lawyers who had charge of his case were not allowed by said Wilfley to practice in said court; and your petitioner, being one of said American lawyers, was threatened by said Wilfley with a charge of contempt of court if he dared to appear in court on the trial of said Price and advise the said Italian lawyer who knew little or nothing about the American procedure and laws.

That contrary to the evidence in the case, said Price was convicted by said Wilfley and sentenced to a term of imprisonment at hard labor for a period of six months at the Shanghai consular jail.

That said Price, through his Italian atto ney, immediately filed notice of appeal to the United States circuit court of appeals for the ninth circuit, and perfected said appeal, and asked that bail be fixed pending the said appeal, offering sureties for any reasonable amount or cash bail for any amount up to $10,000 pending said appeal, which appeal could not be heard for some time as said appellate court was in California, where all the papers must be sent and the appeal argued.

That said Judge Wilfley announced from the bench that having the power to make rules for his court he would promulgate a new rule, which he then read as follows:

> After conviction, on appeal, a prisoner may be admitted to or denied bail in the discretion of the court.

That said Wilfley then refused to allow bail for said Price, then a prisoner before him, and despite the perfecting of his appeal and despite that incarceration nullified the right of appeal given him by law and made it certain that said Price would undoubtedly undergo a long imprisonment whether his appeal was sustained or not.

That thereafter, on the 21st day of February, 1907, the United States circuit court for the ninth circuit issued an order to said judge,

and said order was cabled to the United States court for him, ordering said court to admit Price to bail upon his entering into a sufficient bond in the sum of $4,000 for his appearance when required.

That said Wilfley did not obey said mandate of the said United States circuit court of appeals, but the clerk of his court cabled to the United States circuit court for the ninth circuit asking said court to reverse its mandate, stating that bail was refused to said Price because his appeal was frivolous, and that said Price remained incarcerated in the consular prison of Shanghai until the 25th day of February, 1907, when the circuit court cabled a second order, reaffirming its former order, for the release of said Price upon bail.

That thereafter, and on or about the 6th day of November, 1907, the United States circuit court of appeals for the ninth circuit reversed the conviction of said Price by Judge Wilfley.

SEVENTH CHARGE: That said Lebbeus R. Wilfley while holding the office of judge of the United States court for China, and while acting in such capacity and in disregard of the rights of the defendant before him, in the case of Victorino Torres, a Filipino, subject to the jurisdiction of said court, allowed and permitted the prosecuting attorney, Arthur L. Bassett, to act as an official interpreter of defendant's testimony during said trial, as well as prosecutor of the case, and thereby ignored the constitutional and legal right of said defendant, and prevented him receiving a fair and impartial trial, convicted him, and sentenced him to imprisonment for three years.

All of said charges your petitioner is ready to prove by oral evidence, by affidavits and documents, before you or any person appointed by you to hear and determine said charges, upon reasonable notice being given of said examination and hearing, and a reasonable time in which to produce witnesses, and upon the hearing of such charges your petitioner prays that said Lebbeus R. Wilfley be removed from the office of judge of the United States court for China.

Dated 19th day of November, 1907.

Respectfully submitted.

LORRIN ANDREWS.

Kindly address any communications care of my mother, Mrs. Adele M. Andrews, 367 Grand avenue, Brooklyn, N. Y.

MARCH 2, 1908.

SIR: In answer to your petition dated November 19, 1907, for the removal of Judge Wilfley, I am instructed to send you herewith copies of Secretary Root's report upon the same, in the shape of a letter addressed to the President, and of the letter of the President in answer thereto. The President directs me to state that there is no merit whatsoever in your charges, and that the investigation has shown that Judge Wilfley's services have been of the highest value to decency and morality; and that the assaults made upon him are due not to any shortcomings on his part, but to his vigorous and aggressive warfare against dishonesty and vice. Your petition is accordingly denied.

Very truly, yours,

WM. LOEB, JR.,
Secretary to the President.

Mr. LORRIN ANDREWS,
The New Willard, Washington, D. C.

INTERNATIONAL COMMITTEE OF YOUNG
MEN'S CHRISTIAN ASSOCIATIONS,
New York City, February 27, 1908.

Mr. PRESIDENT: I have heard with astonishment that an attempt is being made to impeach Judge L. R. Wilfley, of the United States court for China.

I have just returned from Shanghai, China, where I resided for ten years as the foreign secretary of the international committee of Young Men's Christian Associations.

I am thoroughly familiar with the conditions which confronted the United States court, the methods adopted by Judge Wilfley, and the results obtained.

The vicious element among the American residents had been for so long uncurbed that they were a serious menace not only to our prestige but to our trade. As a result of the vigorous methods pursued by Judge Wilfley and the officers of the United States court, the treaty ports of China have been largely rid of these bad elements, and no others dare to come in.

The judge is an honest, able, and fearless officer of the law and has inaugurated a new era for Americans in China. He has the support of all Americans in China except those who are defeated litigants and those who want the old régime of unpunished crime to continue.

I do not hesitate to say that it is outrageous that a fearless and incorruptible judge should be in the prosecution of his duties thus harried by persons who have largely felt the strong hand of the law upon them, and still more outrageous that even a single Member of Congress should lend himself to the support of such unwarranted proceedings.

I trust I may express the hope that after satisfying yourself of the correctness of these facts you will, Mr. President, give our court in China the benefit of your powerful support.

Very respectfully, your obedient servant,

ROBERT E. LEWIS,
Secretary of the International Committee.

The PRESIDENT,
The White House.

UNITED STATES COURT FOR CHINA,
Shanghai, China, November 11, 1907.

Hon. ELIHU ROOT,
Secretary of State, Washington, D. C.

SIR: I have the honor to acknowledge the receipt of your letter of June 11, 1907, in which you instruct me to report to the Department all actions of every kind taken by the United States court for China. You directed that in this should be included full reports of all the cases decided before the court, or, in default of any better report of the proceedings, properly arranged clippings from the newspapers giving the best account of the cases. You also instructed me to make such comments and suggestions as I might deem useful to enable the Department to understand the situation in China. In reply to your instructions, I respectfully submit the following report:

The United States court for China was formally opened on December 17, 1906. After receiving the commissions of the several officers of the court, the following rules were published:

The first term of the United States court for China at the city of Shanghai, China, will begin on January 2, 1907, at 10 o'clock forenoon, in the American consulate-general in the said city.

The procedure of the court shall be in accordance, so far as practicable, with the existing procedure prescribed for the United States consular courts for China until changed or modified by order of court.

American attorneys who desire admission to practice in this court shall qualify by furnishing a certificate of good moral character satisfactory to the court and by passing an examination on such branches of the law as may be prescribed by the court. Examinations shall be public and shall be held in the American consulate. They may be written or oral.

A written examination for admission to practice in this court will be held in the American consulate at Shanghai on Monday, December 24, 1906, at 9 o'clock forenoon, The examination will embrace the following subjects: (1) Equity, (2) evidence and pleading, (3) contracts, (4) torts, (5) international law (conflict of laws), (6) criminal law, (7) United States Revised Statutes, sections 4083–4130, and act of Congress of June 30, 1906, creating a United States court for China, (8) corporations, (9) wills and administration of estates.

Persons desiring to take this examination shall file application, accompanied by certificate of moral character, with the clerk of the court on or before December 22, 1906.

A foreign legal practitioner certified by an official of his own nationality vested with judicial authority may be admitted by courtesy to practice in this court.

EXAMINATIONS.

In compliance with the rule of court requiring the American attorneys who desired to practice in the court to qualify by furnishing a certificate of good moral character satisfactory to the court and by passing an examination in such branches of the law as the court should prescribe, eight attorneys presented their written application for permission to take the examination. The examination was held on December 24, 1906, at which time the following applicants took the examination: Lorrin Andrews, F. M. Brooks, Stirling Fessenden, H. H. Hart, C. R. Holcombe, T. R. Jernigan, Edwin Lamme, and W. L. Rodgers. Of the above-named applicants Messrs. Stirling Fessenden and T. R. Jernigan qualified. A copy of the examination questions is attached hereto (Exhibit 1).

Other examinations were later held at Shanghai and Tientsin. At Tientsin there were three applicants, E. P. Allen, W. S. Fleming, and G. W. Drolette, of whom the first two qualified. Later W. H. Heen and Lorrin Andrews took the examination at Shanghai and were admitted to practice. The court has announced that the next regular examination will be held at Shanghai on December 2, 1907.

SESSIONS.

The court has held sessions as follows:
At Shanghai, from January 2, 1907, until March 19, 1907.
At Tientsin, from March 27, 1907, until April 20, 1907.
At Hankow, from April 27, until April 29, 1907.
At Shanghai, from May 1, 1907, until May 17, 1907.
At Canton, on May 24, 1907.
At Shanghai, from June 7, 1907, until September 4, 1907.

CASES.

Up to the close of the term of court at Shanghai on September 4, 1907, there have been filed in the court 21 criminal cases, 44 civil

cases, and 55 estates for probate. Attached hereto is an exhibit showing the numbers, titles, and the nature of the cases filed (Exhibit 2).

BAR EXAMINATIONS.

The action of Judge Wilfley in requiring lawyers who wished to practice in the court to qualify by furnishing a certificate of good moral character and by passing an examination would probably have caused no comment had more of the candidates qualified. It was said by some that the court should have adopted a rule which would have admitted to practice all persons who could show certificates of admission to the several State and Federal courts at home. However, a knowledge of the conditions which the court had to meet will show that the action taken was the proper one. The fact that a rule has been adopted in a large number of courts at home is not a sufficient reason why it should have been adopted here. The conditions at home and here are different. At home the courts have been long established and are all institutions of one sovereignty. The practitioners are usually well known to the judge of the court, and when a stranger presents himself he is vouched for by well-known resident lawyers, upon whose recommendations the judge may rely. Furthermore, at home the admission of an improper person is not so serious a matter as it is here. There are no bar associations in China to keep up the standards of the practitioners, and here public opinion does not interest itself in such matters. The greater part of a lawyer's business is transacted in his office and only a small part comes into court.

In the United States, where the courts are old institutions and the laws are well established, people are loath to enter into litigation. In China, where each nationality maintains its own courts and a great confusion and diversity exists in the laws, a controversy will only be taken to court as a last resort. Furthermore, the American court is only one of the many courts in Shanghai and only hears a percentage of the cases tried here. However, an American lawyer is permitted to practice in the courts of other nationalities upon presentation of a certificate that he has been admitted to practice in the American court. An attorney, however, no matter in what court he is practicing, can only be called to account by the court of his nationality. The several courts, therefore, by admitting attorneys to practice and by certifying them to the courts of other nationalities must necessarily vouch for the person so admitted and certified. Under these circumstances the obligation rests upon a court to determine well that the men whom it certifies and recommends to the courts of other nationalities as a person qualified to be an attorney at law is in fact a proper person. The new judge, upon his arrival in Shanghai, found practicing before the consular court several men who had certificates to practice in the courts at home, but whom he considered unfit to perform the duties of the office of attorney at law.

One lawyer had been a member of a firm of attorneys in the Philippine Islands and had been a party to transactions for which, after his departure from Manila, his partners were suspended from the practice. Another of the lawyers had left the Hawaiian Islands to avoid prosecution. He had been indicted in the Federal courts there, together with a large number of Japanese, for having entered into a conspiracy to violate the Edmunds Act. He was accused of being the

attorney for a so-called "Ten-Dollar Club," which had been organized for the purpose of guaranteeing immunity from prosecution for a large number of Japanese prostitutes in Honolulu. The indictment against him was quashed by reason of the fact that the prosecuting witness escaped from the Hawaiian Islands and returned to Japan. According to the information which has been furnished by the district attorney of Hawaii, this witness was later extradited and brought back to Honolulu for trial, whereupon the attorney against whom the indictment had been quashed by reason of the absence of the witness entered into an agreement with the district attorney that he would leave the islands and not return if the new prosecution should not be instituted against him. This attorney came to Shanghai and has been here since practicing before the consular courts. His partner also came from Honolulu, and must have known the reputation of the man he came here to associate with in the practice of his profession. It is not strange, therefore, that the court should have required such men who desired to practice before it and to be certified to the courts of other nationalities that they should show their qualifications and be properly vouched for. The act creating the court had made no mention of the qualifications of the attorneys who should practice in the United States court for China. The court in requiring the attorneys to show their qualifications only exercised a right which inheres in every court and followed the law prescribed by Congress for the courts of the District of Columbia, by section 218 of its code, and made such rules as it deemed proper "respecting the qualification, examination, and admission of attorneys to practice in said court."

NEWSPAPER REPORTS.

All the sessions of the court are attended by newspaper reporters, and the four daily papers printed in English in Shanghai give full reports of the court's proceedings. Attached hereto is a compilation of newspaper clippings referring to the work of the court, from which clippings may be learned what action the court has taken in each case. (Exhibit 3). Some of the cases, however, deserve special mention.

THE CRIMINAL CASES.

The McCord case.—The first case which came before the court was the case of the United States *v.* R. J. McCord. Before the case came on for hearing the defendant, McCord, who was charged with obtaining money under false pretenses, had been released on bail. At the trial, on January 8, 1907, the defendant was found guilty and notified that sentence would be passed upon him the following morning. During the night, however, McCord fled from the jurisdiction of the court. This brought at once to the knowledge of the court that it was very easy for a person to escape from its jurisdiction, and also a knowledge that release upon bail in Shanghai was tantamount to a permanent release. Shanghai is the largest commercial center in China, and, daily, boats flying the flags of various nationalities are leaving for all parts of the world. Our extradition treaties with foreign nations have been construed by the Department not to extend to our extraterritorial jurisdictions in China. Under this construction, therefore, a fugitive from justice who has escaped to a foreign jurisdiction can not be returned to China for trial or imprisonment, and at present even the American authorities in China can not secure the return from

the United States of a fugitive from justice who is found therein. Once out of the jurisdiction of this court, therefore, there is no way to return a fugitive for trial or imprisonment. The McCord case and the Adsetts case, a report of which will be found in the files of the Department, in which a fugitive from another country was found in China, both show the necessity of some legislation providing for the return to and surrender by the American authorities in China of fugitives from justice.

The Price case.—Shortly after the escape of R. J. McCord, S. R. Price was convicted of having committed an assault and was sentenced to imprisonment for six months. His attorney immediately gave notice of appeal to the circuit court of appeals in San Francisco and asked that defendant be released upon bail. An appeal was granted, but the admission of bail was denied. The act of Congress of June 30, 1907, creating the United States court for China provided that the procedure of the court shall, as far as practicable, be the same as the procedure then existing in the consular courts in China, in accordance with the Revised Statutes of the United States. However, the judge of the United States court was given authority to modify and supplement said rules of procedure. The intention of Congress in the matter of appeal and admission to bail is evidenced by the provisions of section 4095 of the Revised Statutes of the United States, which is as follows:

When any final judgment of the minister to China, or to Japan, is given in the exercise of original or of appellate jurisdiction, the person charged with the crime or offense, if he considers the judgment erroneous in point of law, may appeal therefrom to the circuit court for the district of California; but such appeal shall not operate as a stay of proceedings unless the minister certifies that there is probable cause to grant the same, when the stay shall be such as the interests of justice may require.

Section 66 of the regulations of the minister prescribing the procedure for the consular courts, which were passed in 1864, and which existed and had the force of law at the time the new court was organized, provided:

Sec. 66. After conviction and appeal, the prisoner may be admitted to bail only by the minister.

This ruling was modified by the court to read as follows:

After conviction and appeal, the prisoner may be admitted to or refused bail in the discretion of the court.

The following are the reasons the court gave for refusing to admit Price to bail:

The law creating this court provides that the procedure of the said court shall be in accordance, so far as practicable, with the existing procedure prescribed for consular courts in China in accordance with the Revised Statutes of the United States; provided, however, that the judge of the said United States court for China shall have authority from time to time to modify and supplement said rules of procedure. Rule of procedure 66 says: "After conviction and appeal, the prisoner may be admitted to bail only by the minister." It will become necessary for the court to exercise its right under the law, to modify this regulation, and the court has decided to make a modification of this section as follows: "After conviction and appeal the prisoner may be admitted to or denied bail in the discretion of the court." In many instances appeals may be taken for frivolous or unsubstantial reasons, for no other purpose except to gain delay and, if possible, to defeat the ends of justice. In cases where it is manifest to the court that the accused is guilty of the crime charged and that no serious question of law or fact entered into the trial of the case, it is but proper that the matter of admitting to bail after conviction should be left to the discretion of the court. It is true that the distance is great between China and the United States, where the court of

appeal sits, and it will require considerable time to have rulings of this court reviewed by the appellate court. That is a very good reason, as counsel states, for admitting to bail. It is also a very good reason for refusing bail in these cases above indicated. It is not fair to presume that the court will refuse a prisoner bail when there is substantial doubt as to his actual guilt, but if after hearing all the testimony in the case and after hearing arguments of counsel, the court is convinced that the questions to which exception are made are frivolous and unsubstantial, the ends of justice will be better subserved by the punishment following speedily on the heels of the crime than by permitting a long delay. The court has decided to enforce the modification of section 66 of the regulations to the effect which I have stated. The appeal will be granted in this case, but admission to bail will be denied. The marshal will take charge of the prisoner and commit him to jail.

Immediately after the court took this action Mr. Lorrin Andrews went to San Francisco to obtain the release of Price on bail. The evidence in the case had been taken by a stenographer employed by the firm to which Mr. Andrews belonged. The stenographer has made an affidavit that, in preparing the copy of the transcript for Mr. Andrews to take with him to San Francisco, he was instructed by his employers to omit from the record the reasons given by the court for refusing to admit the defendant to bail pending appeal. Upon his arrival in San Francisco Mr. Andrews filed in the court of appeals a petition for a writ of habeas corpus for admission to bail, and mandate, and, in support of his petition, an affidavit was filed by one Bert Schlesinger, upon the information furnished him by Mr. Andrews. The petition was granted and Price was admitted to bail in the sum of $4,000. It has since developed, however, that the transcript of the record which Mr. Andrews took with him was not filed in the appellate court and that the statements made in said petition and affidavits upon which the appellate court based its action were false. There is now pending in this court a proceeding, investigating the professional conduct of Mr. Andrews in this matter. Though the release of Price by the appellate court appeared to be a reversal of the holding of the United States court for China in refusing bail, from the wording of this mandate, it seems that the matter was brought before the circuit court of appeals in such a way that the holding of Judge Wilfley was not considered by that court.

The Biddle case.—The next case of special interest to come before the court was the Biddle case. It was early seen that the laws to be enforced were in such general terms that the court would probably experience difficulty in construing them. The act of Congress creating the court provided that the court should enforce the statutes of the United States in so far as applicable, the common law, and the regulations which should be promulgated by the minister. The statutes of the United States have little application in China. The term "common law" as used in the statute was so indefinite that it at once presented difficulties. This was a court of the United States and there is no such thing in the United States as a national common law. What common law, then, did the statute refer to? Certainly not to common law of England, and it did not mean the common law of Massachusetts or of Maryland, nor did it mean the common law of any particular State. The argument was made that the construction should define a law common to all the States. Each State by legislation or by judicial interpretation has defined what its common law is, but the definitions are not uniform. There were, however, certain laws which, independent of legislation, would have continued in force in the colonies, and it was this body of law that it was argued

should be held to be the common law within the meaning of the statute. Still, such a definition would have only given the laws as they existed at the time of the Declaration of Independence, so it was necessary, in order to make the definition a practical one, that it should include the development of the laws since that time. In this case the court therefore defined the common law as follows:

> The term "common law" as used in the statute is interpreted to mean those principles of the common law of England and those statutes passed in aid thereof, including the law administered in equity, admiralty, and ecclesiastical tribunals, which were adapted to the situation and circumstances of the American colonies at the date of the transfer of sovereignty as modified, applied, and developed by the decisions of the State courts and the decisions of the United States courts, and incorporated generally into the statutes and constitutions of the States.

The court therefore held that statute 30, George IV, which was enacted seventeen years before the Declaration of Independence and was passed to aid the common law by supplying the deficiencies of the crime of cheating, was within the meaning of the term as used in the act of Congress. Biddle was found guilty and imprisoned.

The cases of Price and Biddle attracted considerable attention in China by reason of the fact that both parties were well known here. Price has been known throughout the Orient for a number of years. He was prosecuted in Manila several years ago for running the Country Club, a well-known gambling house there. His establishment was closed up there, and he was sentenced to imprisonment. He then came to Shanghai and took over the Alhambra, the largest gambling house in the Orient. This place is located just outside the limits of the international settlement. Several attempts have been made by the municipal council to have it closed, and to prevent gambling therein, but the place has been kept open by reason of the fact that the Spanish authorities have given it their protection. Although the place is under Spanish protection, and is presumably owned by a Spaniard, it is generally believed here that Price is the real owner. Biddle was a rival of Price. For some time he had been the manager and owner of a majority of the stock of the Hotel Metropole; he was also the lessee of the Alcazar, a resort similar to the Alhambra. Both men were prominent in gambling circles, and their conviction and sentences of imprisonment has had a good effect in inspiring uneasiness among the criminal classes of the community.

The "American girl" cases.—The effect the last action in sentencing Price and Biddle to imprisonment has had upon the bad element of the community was evidenced by the attitude of the defendants in the next cases which came before the court. At the conclusion of the Biddle trial informations were filed against eight of the well-known bawdy-house keepers in Shanghai for the common-law crime of keeping a disorderly house. Although this action was not entirely unexpected, it has probably been the subject of greater comment than anything else the court has done. For many years the business of prostitution has been a well-known feature of Shanghai life, and during recent years American women have come to the East in such numbers that the term "American girl" has become synonymous with "prostitute" in China. The influence of this class was probably greatest in Shanghai, although in other cities a large number of the women were to be found. Their influence was felt in the social, political, and commercial life of the settlement. When the informa-

tions were filed against the keepers of the houses the North China Daily News, the oldest and probably the largest English newspaper in China, published an extra, and it is said that the excitement which prevailed in the Shanghai clubs was greater than that occasioned by the outbreak of the Russo-Japanese War. These women kept large and luxuriantly furnished houses, most of which had been built for their purposes, and they daily appeared on the principal drive of the city in magnificent turn-outs. Within a few hours after the information had been filed they had deposited in cash bonds more than $15,000. Four of the accused pleaded guilty, and, having made a promise to the court that they would leave China and not return as prostitutes or keepers of houses of prostitution, were each fined $1,000 Mexican currency. Two of the defendants tried to escape from the jurisdiction of the court by producing certificates of citizenship which had been issued after their arrest by the Spanish consul-general in Shanghai. The court held that while these certificates were evidence of citizenship they were not conclusive, and that the question of citizenship would be inquired into. Thereupon the two certificates were immediately withdrawn and the defendants admitted that they were Americans and entered pleas of guilty to the charges. One defendant proved that she was a German by birth, and the case against her was dismissed. The other endeavored to prove that she was English, but failed. All of the women who were convicted promised in open court that they would leave Shanghai and not return as prostitutes or keepers of houses of prostitution.

When the informations were filed against the keepers of the houses, the inmates were sent for by the district attorney. In the light of what had been done it is needless to say that they had become panic-stricken, and in a few days all the women who had been known as "American girls" had left the jurisdiction of the court. Shortly thereafter, when the court went to Tientsin, it was found that its action in the above cases had been felt there. All of the American houses of prostitution and gambling houses in Tientsin were closed, without the necessity of prosecution, and no prosecutions were necessary in Hankow, since the houses had been closed and most of the women had fled before the court arrived at that port. The effect of these prosecutions has without doubt been good. At present not a single lewd woman within the jurisdiction of this court admits she is an American. I do not mean to say that there are no Americans among large number of prostitutes in China, but not one is now known as an "American girl." Of the women against whom the prosecutions were brought, five of them have by marriage attempted to become subjects of other nations and have returned to Shanghai. This, of course, tends to destroy the beneficial results of the prosecution, since, although it is believed that they are not under the jurisdiction of the American court, they have for a number of years been known as "American girls." It is said that these women boast of the fact that they have evaded our jurisdiction and are now protected by the other nations. What the attitude of the other nations in this matter will be remains to be seen. However, it might be mentioned that on a recent date the gambling houses, the Alhambra and Alcazar, which places were also popular resorts for these women, have been ordered to be closed by the consuls under whose protection they were, at the unanimous request of the consular body.

REGULATION OF THE MINISTER.

It was early ascertained that the common law did not make proper provision for dealing with the class of persons commonly known in the United States as "vagrants." The keepers of the disorderly houses could be punished under the common law, but the inmates could not be reached. It was also a well-known fact that embezzlement was not a crime at common law. These matters were brought to the attention of the minister, who exercised the authority vested in him by section 4086 of the United States Revised Statutes and promulgated a regulation making embezzlement and vagrancy crimes in China. [Exhibit 4.] It was well understood that when this request was made doubts had been expressed by the Department as to whether the minister had authority to promulgate regulations containing substantive law. However, the question of the minister's authority could never be settled until properly determined by the courts. The above regulation contained the provisions usually found in the statutes of the various States of the Union, and there was no question that these laws were badly needed in China. Although they were promulgated last spring, and there have been a number of cases tried under them, the minister's authority to promulgate them has not been questioned.

THE CIVIL CASES.

A large number of important civil cases have been tried by the court involving jurisdictional questions and questions of mercantile law. Some of these cases have been watched by the business community, and the decisions have been published generally throughout China. The court has followed the practice of reducing its decisions to writing before they are handed down, and a full text of these is published in the local newspapers. This enables the court to obtain for a nominal cost printed copies of the decisions, and these copies have been furnished to the diplomatic and consular officers and lawyers throughout the Empire. I shall attach hereto copies of the most important of the court's decisions. [Exhibit 5.]

The McDermid case.—In the case of McDermid *v.* McDermid the question was raised as to whether the court had jurisdiction to hear and determine matrimonial causes. This case was of interest by reason of the fact that several divorces and judicial separations have been granted in China by the consular courts, and a doubt had long existed as to the authority of these courts to take jurisdiction of such matters under the common law. In a long and well-considered opinion the court held that jurisdiction in matrimonial causes in England prior to the transfer of sovereignty was wholly in the ecclesiastical courts, and that in the United States the law was well settled that in the absence of specific statutory authority no court had authority to grant divorce. For these reasons the court refused to take jurisdiction of the case.

The stock-gambling case.—In the case of Toeg and Read *v.* Suffert the question was raised whether a contract between a broker acting as agent for a party who was operating on the stock exchange for the purchase and sale of stocks was a contract that could be enforced at common law. The evidence showed that the contract was one which

contemplated a "settlement upon differences," and that there was no intention on the part of the parties to deliver the stock, and this was known by the broker at the time the contract was made. The court held that while there was some doubt as to whether such a contract would be enforceable under the old common law, that recent decisions of the United States Supreme Court had clearly held that such contracts were illegal and void as being contrary to public policy and that these decisions were binding in this court.

The Rodgers case.—On the day Consul-General Rodgers left Shanghai for Habana, George F. Curtis, esq., as attorney for Albert W. Cunningham, the administrator in the State of Maine for the estate of Henry H. Cunningham, filed a suit against him for $58,165.85. The case was filed so late that the marshal failed to get service on Mr. Rodgers before he left Shanghai. However, through the Department Mr. Rodgers authorized Mr. Boyd to admit service for him and expressed a desire that the case be tried here. Mr. Rodgers, as consul-general, had admitted to probate in the consular court the will of Henry H. Cunningham, and the suit against Mr. Rodgers was based on the theory that his action in probating the said will was void, and that the will left by the deceased was not a valid will. The brother of the deceased had been appointed administrator for the estate in Maine and the action here was brought in the name of the brother as administrator. On behalf of the defendant there was filed a plea in abatement, denying the authority of an administrator appointed in Maine to maintain an action in this jurisdiction. The court held that for the purposes of administration of estates China was a complete jurisdiction and the plea was sustained. Notice of appeal was given but the appeal has not been perfected.

PROBATE CASES.

Roberts will case.—In the matter of the probate of the will of Capt. John Pratt Roberts the question was raised whether the court had jurisdiction to probate wills and administer the estates of Americans decedent in China. After making a thorough historical review of the common law on the subject, the court held that it had such jurisdiction. Perhaps no decision of the court has given such general satisfaction as the one in this case. The reason for this was that there had been great confusion in the minds of the courts and the people on this subject, and consequently there had been no uniformity of administration of estates in the various consular courts in China. Some estates had been dealt with judicially and others administratively. Some consular courts had undertaken to apply the common law, whilst others endeavored to enforce the law of the states of the domicile or origin of the deceased. The decision of the court in this case will require that all estates of Americans decedent in China will be administered either in the court itself or under its supervision, and will insure a uniformity in the methods of administration.

The Allen case.—In this case the court held that the American law of domicile applied to residents of China. Doctor Allen had resided in China for forty-seven years and had expressed the intention of residing here permanently. The court held he was domiciled here. This holding is contrary to the British rule as laid down in In re Tootal's Trust and for this reason attracted the attention of the residents here. The full text of this decision will be found attached to Exhibit 5.

CONCLUSION.

From the outset of the work of the court it has been evident that the laws are deficient in many respects and that the deficiencies could only be remedied by additional legislation. The "common law," whatever that term comprises, is inadequate to meet the needs of the situation. The criminal law should be amplified so that no doubt should exist that obtaining money under false pretenses and embezzlement are crimes, and a scale of penalties should be prescribed. The law of probate and the probate jurisdiction of the court should be fixed by statutory enactment. An extradition law should be extended to the extraterritorial jurisdiction of China to enable the United States to fulfill her treaty obligations and to prevent China from becoming an asylum for fugitives from justice. To obviate the difficulties which are certain to arise if the common law of real property is applied to estates held by Americans in China a statute should provide that realty held by Americans shall for the purpose of administration be regarded as personalty. The laws of divorce and bankruptcy and the jurisdiction of the court in such matters should be settled by legislation. Also the question of the court's jurisdiction in admiralty matters should be set at rest.

The work of the court has been more difficult by reason of the inadequate quarters provided for the court. At present the court is quartered in the consulate and a single room is made to serve the purposes of court room, judge's chambers, office for the marshal, clerk, and district attorney, as well as court library.

Mr. Taft, during his visit to Shanghai, in a speech recognized the needs of legislation supplying the defects in the existing laws and the necessity for better quarters for the court and consulate. The American Association for China has prepared a memorial to be submitted to Congress, pointing out the needs for additional laws and a new building, and have petitioned that immediate action be taken on these matters.

In spite of the difficulties which the court has had to face, the work of the court has in less than a year justified its existence. The court has been the object of bitter attacks by the element who have heretofore profited by the lax enforcement of the laws in this community, but the China press has spoken in highest terms of its work [Exhibit 6], and the best citizens are giving the court their hearty support.

I am, sir, your obedient servant,

A. BASSETT, *District Attorney.*

In the United States court for China at Shanghai.

Examination in criminal law, December 24, 1906.

1. A was a sales clerk in B's store. For a sale of goods he received a ten-dollar bill which he wishes to appropriate. To avoid detection he placed the bill, as was customary, in the cash drawer, but later in the day, during B's absence, A took the bill from the drawer and appropriated it. What crime did A commit?

2. During a heated dispute over business matters A called B a liar. B in anger raised a heavy cane in a threatening manner saying, "If you were not an old man, Mr. A. I would break this cane over your head." What crime, if any, is B guilty of?

3. A, intending to rob B's dwelling house, made a proposition to C, a servant of B, whereby C agreed to unlock a certain door of the house. C informed B, who told C to act as he had agreed. C opened the door as planned, and at midnight A entered, took B's silver plate, but as he was leaving the house with the plate he was apprehended by an officer who was placed theref or that purpose. What crime was A guilty of?

4. B, who suspected his clerk of stealing, placed a marked counterfeit five-dollar bill in the money drawer. The clerk, intending to steal the bill, took the same from the drawer. He was later arrested, and the marked bill was found on his person. What offense?

5. A strikes B with a cane. A is tried immediately and convicted of an assault and battery. It later develops that the striking had injured B's skull, and as a result of the blow B dies within six months of the time he was struck by A. A is then indicted for homicide. A pleads the former conviction for assault and battery. Is the plea a good one?

In the United States court for China at Shanghai.

Examination in equity, December 24, 1906.

1. Give the origin of equity considered historically.
2. What are the three great divisions of equitable jurisdiction?
3. Is a court of equity controlled by precedent? Why?
4. The D Railroad contracts with P that if P will deed to the road 10 acres of land off the south side of his farm, the D Railroad Company will build a station at X, where the road crosses the south line of P's farm. P accordingly conveys the 10 acres to D. Later he conveys the rest of the farm to C. D refuses to build the station according to the contract and C brings his bill. What decree? Why?
5. What is the nature and function of a crossbill?
6. What is the cypres doctrine?
7. Harriman and Hill are rivals for the control of the stock of Northern Pacific Railroad Company, the stock of which is listed on the New York Stock Exchange. Smith, a third party, owns the remainder, 2 per cent, of the stock. In consequence of the purchases made by Harriman and Hill in their endeavor to gain control of the stock its market value increased from $100 to $1,000 per share. Harriman, knowing that Smith had been in Europe and was ignorant of this rapid increase, went to Smith and made him an offer of $125 per share for his stock, which Smith accepted. On learning the facts Smith refused to transfer the stock to Harriman and threatened to sell it to Hill at $1,000 a share. What are Harriman's rights?

In the United States court for China at Shanghai.

Examination in evidence and pleading, December 24, 1906.

I.—EVIDENCE.

1. Define relevancy.
2. What is meant by a demurrer to the evidence at common law?

3. In an action for personal injuries in an elevator accident alleged to have been caused by the negligence of the elevator boy plaintiff offers the following evidence:

(*a*) That the boy had been discharged for similar negligence at another hotel.

(*b*) That he had been negligent on a former trip the same day.

(*c*) That he was discharged immediately after the accident.

Defendant offers to prove:

(1) That the boy came to him well recommended.

(2) That at the time of the accident he was running the elevator in the way usually adopted in other hotels.

Which, if any, of these offers should be excluded?

4. D is on trial for murdering his wife X. The prosecution claims that the murder was committed by administering a rare poison, and that D committed the murder to collect the insurance on the life of his wife. The prosecution offer to prove the following facts:

(1) That D's character is thoroughly bad.

(2) That he has been married five times; that his wives have all died after a short illness; that the symptoms in each case were the same as in the case of the last wife, whose death is under investigation, and are the symptoms characteristic of the poison in question; that D has always insured the lives of his various wives and collected the insurance in each case.

Is any of this evidence admissible? Why?

5. Deceased having been shot while in the street several blocks from his home, ran home and, meeting his wife at the door, told her that he had been shot by the prisoner and that everything was growing black before his eyes. He then fell to the ground in an unconscious condition, but afterwards rallied and gave a full account of the affair to his wife and the physician who had been called in to attend him. While still engaged in doing this he died. When his wife first saw him after the shooting blood was streaming from a wound in his head and it was very evident that he could not live many minutes. The several declarations made by him were offered in evidence on one or more of the following grounds: (*a*) as forming part of the res gestæ; (*b*) as dying declarations; (*c*) as statements of physical condition made to a physician.

The court admitted them as dying declarations, submitting to the jury the question whether they were made in contemplation of death or not. Was this ruling correct? Give reason.

II.—PLEADING.

1. Name the writs used at common law in (*a*) real and mixed actions, (*b*) in personal actions.

2. What is the essential difference between common law pleading and the so-called "code pleading?"

3. A contract is entered into by the General Electric Company and the Waldorf-Astoria Hotel Company, both New York corporations, whereby the former agrees to furnish electricity to light the Waldorf-Astoria to be paid for by the ampere, the amount to be determined by meter measurement, the wattmeter being specified. The electric

company installed a wattmeter and furnished electricity as per agreement for one month. When the bill was presented to the hotel company payment was refused on the ground that the amount of electricity shown by the bill had not been consumed. The electric company brought suit for the amount of the bill. The hotel company filed a general denial. At the trial the plaintiff proved that according to the meter the amount claimed had been furnished. The defendant undertook to prove that there was a defect in the meter. The plaintiff objected. What should the court have held? Had the answer been a general issue under the common law, what should the ruling have been?

4. Wherein does certiorari differ from writ of error?

In the United States court for China at Shanghai.

Examination in torts, December 24, 1906.

1. A man in the city of Washington, D. C., charged a woman with fornication. Fornication in the District of Columbia is not an indictable offense. What action has the woman and what are the necessary allegations and proofs in order to recover?

2. By reason of the fact that the screen on the chimney of A's mill was in bad condition sparks from his engine fell on the adjacent lot belonging to B. B notified A of this fact. The following day B placed a pile of lumber on his land near some inflammable waste material. A few days later a spark from A's engine set fire to the waste material from which the lumber caught and was destroyed. Has he an action against A?

3. Mr. Smith, a real estate agent and money lender, sent for Mrs. Jones, a widow, who has money to invest, and offers her a note of Brown for $5,000 secured by a first mortgage on a piece of real estate worth $10,000. Mrs. Jones asked Smith if the security was ample and if the loan was a good one. He advised her it was. As a matter of fact, the deed of trust securing the note had been released of record and this was then known by Smith at the time the sale of the note was made to Mrs. Jones. Brown was insolvent. Mrs. Jones sued Smith for the amount of the note. Is she entitled to recover? What is meant by the doctrine of caveat emptor?

4. What are the essential elements of actual or positive fraud? Define constructive fraud.

5. An employer of a gang of workmen ordered the foreman to replace a badly worn rope used by the gang in their work. The foreman neglected to do so, and by reason of its worn condition the rope broke and an employee was injured. Has the injured employee an action against the employer? Give reasons.

In the United States court for China at Shanghai.

Examination in contracts, December 24, 1906.

1. The Philippine government entered into a contract at Manila with Farnham Boyd & Co., of Shanghai, for the construction of ten coastwise vessels to be constructed out of first-class materials and

paid for after inspection, trial, and acceptance at Shanghai by an expert of the Philippine government. The price was $1,000,000. The vessels were accepted after trial and inspection, but before payment the shafts in seven of the ten vessels broke, due to latent defect, and their propellers were lost at sea. The damage sustained was $50,000.

The company sues the Philippine government in the courts of the Philippine Islands. If the court find that there is a conflict between the old Spanish law which is in force in the Philippine Islands and the common law, which is in force in Shanghai, which law shall control? What amount is the company entitled to recover? Why?

2. A owed B $2,000 and C $1,000. C instituted an action against A, and while the action was pending A conveyed to B all his goods and chattels worth $1,500. A, however, continued in possession of the goods and chattels so conveyed, and sheared some sheep and marked them with his mark. C received a judgment against A and took the goods which had been conveyed to B in execution. B sued to recover these goods. Should he recover?

3. A, a wool merchant, wrote B, "How much wool have you on hand, and what is your price for it?" B replied, "I have about 20,000 pounds, and my price is 20 cents." A replied, "I will take the wool at the price you name." To this B did not reply, and when called upon to deliver refused to do so. What are A's rights?

4. Brown, a carriage builder, agreed to build for Smith two carriages on a special pattern to be furnished by Smith for $2,000. The transaction was all oral. B built the carriages and offered delivery of them to Smith. Smith refused to accept delivery. Brown sued Smith and the latter pleaded the statute of frauds. Was the plea a good one?

5. A contracted with B to build a terrace of houses for $10,000, to be completed on December 1. It was stipulated that time was to be the essence of the contract, and that for every day after December 1 that the house was not completed A should pay B as liquidated damages the sum of $500. The house was not completed until December 7, on which day B took possession. B refused payment of the contract price, and A instituted suit. B pleaded as a counterclaim $3,000 liquidated damages for the failure of A to complete the house until six days after the 1st of December. What should A recover?

In the United States court for China, at Shanghai.

Examination on the act creating the United States court for China, and Revised Statutes, sections 4083–4130, December 24, 1906.

1. State fully the law which shall be enforced by the United States court for China.

2. On what principles of law has it been held than an American may be tried and convicted for a felony in an extraterritorial port without first having been indicted by a grand jury and without a trial by jury?

3. Define the jurisdiction of the United States court for China.

4. Reproduce fully the substance of the provisions of the act creating the court for China relating to the administration of estates.

5. Has the American minister to China power to promulgate a regulation of the nature of substantive law? Write your opinion fully.

6. What was the main principle laid down by the Supreme Court in the "Ross case?" [It was explained at the examination what the Ross case was, and the facts upon which it was based were recited to the applicants.]

United States court for China, Shanghai, China.

List of actions brought in the several United States consular districts in China between January 2, 1907, when the court was opened, and September 4, 1907, the close of the third term at Shanghai.

I.—CIVIL ACTIONS.

Number.	Name.	Nature.	Amount of claim.
1	M. S. Friede *v.* Getz Brothers & Co., a corporation.	Goods sold and delivered; agency contract; damages (Shanghai).	27,700 taels.
2	H. T. Nelson *v.* F. S. Mayer....	Debt; partnership contract (Shanghai).	$1,200 Mexican.
3	Frazar & Co., *v.* Boston Steamboat Co. and Boston Towboat Co.	Carrier's contract; damages for flour injured in handling from steamer to lighters at Woosung (Shanghai).	4,932.20 taels.
4	Hildebrandt & Co. *v.* Zimmerman & Co.	Carrier's contract; damages for flour injured after discharge on wharf (Shanghai).	$1,043.20 Mexican.
5	F. J. Maitland *v.* G. Collinwood..	Debt on partnership contract; Russian newspaper subsidy during Russo-Japanese war (Shanghai).	$425 Mexican.
6	R. Daly *v.* M. Daly.....	Divorce (Shanghai).....	
7	Woo Ah Sung *v.* C. A. Biddle...	Debt; on contract leasing premises for Chinese race gambling (Shanghai).	6,000 taels.
8	O. C. Radomski *v.* R. C. Radoniski.	Divorce or maintenance (Shanghai)..	
9	Davies and Thomas *v.* Zimmerman.	Debt; on contract for building residences as investment (Shanghai).	1,000 taels.
10	P. W. Irvine *v.* C. W. Mead.....	Debt; on sale of stock by stockbroker (Shanghai).	3,093.50 taels.
11	R. R. McDermid *v.* A. F. McDermid.	Divorce (Shanghai).....	
12	J. J. Connell *v.* R. F. Daly.....	Dissolution of partnership contract of Owl Restaurant.	$10,219.02 Mexican.
13	E L. Mondon (Limited) *v.* C. A. Biddle.	Debt; for wines and liquors sold and delivered (Shanghai).	$3,095 Mexican.
14	E. L. Mondon (Limited) *v.* B. L. O'Connor.	Debt; for wines and liquors sold and delivered (Shanghai).	$1,285.10 Mexican.
15	Laura Brown *v.* S. R. Price.....	Debt; for money loaned on note secured by mortgage of Alhambra entertainment resort (Shanghai).	$36,196.89 Mexican.
16	Ex Parte China Metal and Commercial Co.	Bankruptcy (Shanghai).....	
17	Shanghai Gas Co. (Limited) *v.* A. Biddle.	Debt; for goods sold and delivered and for labor performed (Shanghai)	$974.79 Mexican.
18	Chen Wong Tai *v.* A. W. George & Co.	Debt; on contract for building a tannery for a third party, labor, and materials (Shanghai).	12,579 taels.
19	W. S. Emens et al. *v.* The American Trading Co.	To quiet title to land (Tientsin).	
20	Chartered Bank of Australia and China *v.* Ranger Trading Co.	Debt; for money loaned (Tientsin).	3,375.77 taels.
21	O. Schreyer *v.* China and Java Export Co.	Debt; for services of a physician to deceased agent of defendant (Tientsin).	1,800 taels.
22	Re assignment of J. H. Ranger.	Discharge of assignees and annulment of assignment (Tientsin).	2,000 taels.
23	S. H. Comstock *v.* F. Waterhouse & Co., a corporation.	Carrier's contract; flour injured in in discharging at Taku (Tientsin).	$1,741.07 Mexican.
24	S. H. Comstock *v.* The Boston Steamship Co.	Carrier's contract; flour injured in discharging at Taku (Tientsin).	$1,741.07 Mexican.
25	G. Racine, et al., doing business as Racine, Ackermann & Co. *v.* The Boston Steamship Co. and the Boston Towboat Co., corporations.	Carrier's contract; flour injured in discharging at Taku (Tientsin).	$1,181.40 Mexican.
26	W. Kleeschulte *v.* Ranger Trading Co.	Debt on arbitrator's award (Tientsin).	$9,526.24 Mexican.

List of actions brought in the several United States consular districts in China between January 2, 1907 and September 4, 1907, etc.—Continued.

I.—CIVIL ACTIONS—Continued.

Number.	Name.	Nature.	Amount of claim.
27	G. Racine et al., doing business as Racine, Ackermann & Co., *v.* F. Waterhouse & Co., a corporation.	Carrier's contract; flour injured in discharging at Taku (Tientsin).	$1,181.40 Mexican.
28	Toeg & Read *v.* T. Suffert.....	Debt on specialty (Shanghai).....	4,949 taels.
29	Re appointment of J. M. Darrah as deputy marshal, United States court for China.	Approval of accounts as United States marshal, Feb. 1 to Apr. 19, 1907 (Shanghai).	$9,197.85 Mexican; $390 gold.
30	J. H. Brown and L. Brown *v.* S. R. Price.	Debt for money loaned on note secured by mortgage of Alhambra entertainment resort (Shanghai).	$12,500 Mexican.
31	E. Bavier & Co. *v.* Irvine, Edbald & Co.	Debt on promissory note (Shanghai).	5,255.55 taels.
32	Ex parte M. H. O'Brien, marshal and special disbursing officer.	Approval of accounts as disbursing officer, May 17 to Nov. 5, 1907, (Shanghai).	$2,489.64 Mexican.
33	A. W. Cunningham, administrator, *v.* Jas. L. Rodgers, consul-general.	Damages; misfeasance in administration of estate (Shanghai).	$58,165.85 gold.
34	Chu Kun Kee *v.* A. W. George & Co.	Debt on contract for building a tannery for third party, labor and materials (Shanghai).	1,601.30 taels.
35	Re application of J. H. Brown for mandamus to W. P. Boyd, vice-consul-general in charge.	To require recognition of petitioner as United States citizen (Shanghai).	
36	Woo Ah Sung et al *v.* C. A. Biddle and H. I. Hennage.	To annul assignment and enforce payment on judgment debt (Shanghai).	6,000 taels, or 600 taels per month for 10 months.
37	Wong Sun Tien *v.* J. Green.....	Debt; money loaned (Shanghai).....	$3,055.91 Mexican.
38	O. L. Zilz *v.* P. W. Irvine et al..	Debt on specialty, and dissolution of attachment; interlocutory (Shanghai).	$2,000 Mexican.
39	F. M. Brooks *v.* P. W. Irvine et al.	Debt on specialty, and dissolution of attachment; interlocutory (Shanghai).	$3,025 Mexican.
40	Re C. A. Biddle, bankrupt.....	Bankruptcy (Shanghai).....	Liabilities, $35,419.67 Mexican; assets, $12,571.41 Mexican.
41	Lu Zing Dong *v.* A. W. Danforth .	Debt; money loaned by compradore (Shanghai).	12,719.71 taels.
42	C. A. and B. Fromm *v.* T. L. Cobbs.	Damages for personal injuries; automobile running down rickshaw in which wife was passenger (Shanghai).	$5,000 Mexican.
43	Shanghai Land Investment Co. (Limited) *v.* H. A. McConnel .	Debt: rent for office (Shanghai).....	1,020 taels.
44	Re Lorrin Andrews, investigation of professional conduct.	Disbarment proceedings for filing false affidavit on appeal of United States *v.* Price (Shanghai).	

II.—CRIMINAL ACTIONS.

No.	Name.	Charge.	Sentence.
1	R. G. McCord.....	Obtaining money on false pretenses (Shanghai).	Two years' imprisonment.
2	W. Nelson.....	Assault with dangerous weapon (Shanghai).	Three years' imprisonment.
3	S. R. Price.....	Assault with dangerous weapon (Shanghai).	Six months' imprisonment.
4	Victorino Torres.....	Rape (Shanghai).....	Three years' imprisonment.
5	A. Sangaland and A. Martinez..	Larceny (Shanghai).....	Four months' imprisonment.
6	C. A. Biddle.....	Obtaining money on false pretenses (Shanghai).	Twelve months' imprisonment.
7	J. Alice Duncan.....	Keeping bawdyhouse (Shanghai)....	Fine $1,000 Mexican and costs.
8	Dorothy Grant.....	.....do.....	Do.
9	Minnie Kingsley.....	.....do.....	Do.
10	Emily Moore.....	.....do.....	Do.
11	Maxine Livingstone.....	.....do.....	Do.
12	Mona Monteith.....	.....do.....	Discharged.
13	Zaza Van Buren.....	.....do.....	Fine $1,000 Mexican and costs.
14	Alice Sherwood.....	.....do.....	Do.
15	Margaret Kendall.....	.....do.....	Not apprehended.
16	F. S. Mayer.....	Cheating (Shanghai).....	Do.

List of actions brought in the several United States consular districts in China between January 2, 1907, and September 4, 1907, etc.—Continued.

II.—CRIMINAL ACTIONS—Continued.

Number.	Name.	Nature.	Amount of claim.
17	B. F. Colvin	Obtaining money on false pretenses (Shanghai).	Six months' imprisonment and costs.
18	G. D. Kenny	do	Not apprehended.
19	B. F. Colvin	Prison breach (Shanghai)	Ninety days' imprisonment.
20	T. C. Arlington	Obtaining money on false pretenses (Shanghai).	Not apprehended.
21	Re George F. Curtis and H. A. C. Emery, respondents.	Contempt of court (Shanghai)	H. A. C. Emery, fine $20 gold, or five days' imprisonment; G.F. Curtis, fine $40 gold, or ten days' imprisonment.
22	O. Bishop and J. C. Gould	Cheating (Shanghai)	Two years' imprisonment each.

III.—ESTATE ACTIONS.

Number.	Name.	Will or intestate.	Value in gold.
1	F. Vivanti (Shanghai)	Will	$7,560.00
2	Cossette Denvers, alias Laura Leslig (Shanghai)	Intestate	4,932.00
3	Amelia Ortwin (Shanghai)	Will	30,750.00
4	H. B. Endicott (Shanghai)	do	166,500.00
5	J. J. Bollard (Shanghai)	do	3,700.00
6	A. H. White (Shanghai)	do	306.00
7	Marietta Melvin (Shanghai)	do	1,108.00
8	Anne Gillison (Shanghai)	do	1,000.00
9	Mary Gale (Shanghai)	do	554.00
10	J. P. Roberts (Shanghai)	do	12,975.09
11	G. A. Riddle (Shanghai)	Intestate	a 50.00
12	Marion F. Greenwood (Shanghai)	do	a 50.00
13	D. Conklin (Shanghai)	Will	6,432.00
14	W. E. Dunn (Shanghai)	do	11,332.57
15	D. A. Emery (Nanking)	do	7,200.00
16	Mary C. Robinson (Nanking)	do	11,188.72
17	J. R. Peale (Canton)	do	221.00
18	N. Fairchild (Mukden)	Intestate	a 50.00
19	Dorothy R. Gibson (Hankow)	do	a 50.00
20	H. Reehnitzer (Tientsin)	do	5,315.00
21	J. L. Whiting (Tientsin)	Will	500.00
22	S. K. Palmer (Tientsin)	Intestate	a 50.00
23	P. Jackson (Foochow)	do	148.35
24	Susie B. McCalla (Hankow)	do	a 50.00
25	Sarah A. Coath (Shanghai)	do	a 50.00
26	J. W. Graeme (Shanghai)	do	932.40
27	M. M. Mackenzie (Tientsin)	Will	3,985.21
28	Alice L. V. Hobbs (Shanghai)	Intestate	4,500.00
30	W. N. Pethick (Tientsin)	Will	7,000.00
31	E. M. G. Thor (Hankow)	Intestate	a 50.00
32	Hannah Renning (Hankow)	do	a 50.00
33	Martha F. Jensen (Hankow)	do	a 50.00
34	Elizabeth W. Eyestone (Hankow)	do	a 50.00
35	M. Hildebrand (Harbin)	do	a 50.00
36	L. L. Etzel (Tientsin)	do	a 50.00
37	W. G. Furber (Shanghai)	Will	6,675.00
38	Rose F. Biddle (Shanghai)	do	1,629.00
39	A. Ekstrom (Hankow)	Intestate	a 50.00
40	T. B. Owen (Foochow)	Will	2,000.00
41	Y. J. Allen (Shanghai)	do	5,000.00
42	Ada E. Crandall (Shanghai)	do	2,250.00
43	Thelma Newton (Shanghai)	Intestate	2,695.00
44	Mrs. J. R. Peale (Canton)	do	a 50.00
45	J R. Jones (Nanking)	do	1,000.00
46	L. Bainbridge (Chefoo)	Will	3,000.00
47	A. C. Jones (Nanking)	do	15,000.00
48	Mrs. Della E. Jones (Nanking)	Intestate	14,400.00
49	C. B. Sherman (Tientsin)	Will	60,000.00
50	A. S. Mann (Shanghai)	do	800.00
51	Louis H. Smith (Chefoo)	do	(b)
52	R. E. Worley (Swatow)	Intestate	1,140.30
53	A. E. Jessup (Tientsin	do	2,750.00
54	W. S. Faris (Chefoo)	Will	4,746.00
55	W. B. Seabury (Hankow)	Intestate	775.00

a Under.

b Unreported by Consul-General at Chefoo.

[Exhibit 4.]

REGULATION.

Whereas defects and deficiencies exist in the laws to be enforced by the judicial authorities of the United States in China as regards embezzlement and vagrancy.

Now, therefore, by virtue of the power vested in me by section 4086 of the Revised Statutes of the United States, I, William Woodville Rockhill, envoy extraordinary and minister plenipotentiary of the United States of America at Peking, China, do hereby decree:

1. If any agent, attorney, clerk, or servant of a private person or copartnership, or any officer, attorney, agent, clerk, or servant of any association or incorporated company, shall wrongfully convert to his own use or fraudulently take, make away with, or secrete, with intent to convert to his own use, anything of value which shall come into his possession or under his care by virtue of his employment or office, whether the thing so converted be the property of his master or employer or that of any other person, copartnership, association, or corporation, he shall be deemed guilty of embezzlement, and shall be punished by a fine not exceeding $1,000, or by imprisonment for not more than ten years, or both.

2. All persons having no visible means of honest and reputable support, or who lead an idle and dissolute life, and all persons living by stealing or by trading in, bartering for, or buying stolen property, shall be deemed and considered vagrants, and upon conviction thereof shall be punished by a fine not exceeding $100 or by imprisonment for not exceeding sixty days, or both.

(Signed) W. W. ROCKHILL.

AMERICAN LEGATION, PEKING, CHINA, *April, 3, 1907.*

In the United States court for China at Shanghai, March, 1907.

United States of America v. C. A. Biddle.

RULING ON THE DEMURRER TO THE INFORMATION.

SYLLABUS.

Demurrer to information charging obtaining money under false pretenses within 30 George II (1757) (cap. 24, sec. 1), supplying defects of the common law relating to cheats, said demurrer being based on a contention that said statute is not a portion of the common law to be enforced in the jurisdiction of the United States in China, is overruled.

The term "common law," as used in the act of Congress of June 30, 1906 (34 Stat., 814), creating a United States court for China, is interpreted to mean those principles of the common law of England and those statutes passed in aid thereof, including the law administered in the equity, admiralty, and ecclesiastical tribunals, which were adapted to the situation and circumstances of the American colonies at the date of the transfer of sovereignty, as modified, applied, and devoloped generally by the decisions of the State courts and by the decisions of the United States courts, and incorporated generally into the statutes and constitutions of the States.

OPINION.

The information in this case charges C. A. Biddle with the crime of obtaining money under false pretenses. A demurrer to the infor-

mation has been filed on the ground that the facts alleged in the information do not constitute an offense. The demurrer is based upon the contention that obtaining money under false pretenses is a statutory and not a common-law offense, and since there is no United States statute on the subject it is not a crime to obtain money under false pretenses in China.

The law defining and providing for the punishment of the crime of obtaining money under false pretenses is found in 30 George II (1757) (cap. 24, sec. 1), which was enacted to supply the defects of the common law relating to cheats. The American statutes on obtaining money under false pretenses follow in substance the English statute. (Bishop, New Criminal Law, vol. 2, pp. 236–237.)

The question raised by the demurrer to the information is as follows: Is the above-mentioned provision of the English law included in the "common law," as the term is used in section 4 of the act of June 30, 1906, establishing this court? This calls for an interpretation of the term as used in the statute.

Chief Justice Marshall, in a ruling made during the trial of Aaron Burr, held that the term "common law" referred to "those general principles and those general usages which are to be found, not in the legislative acts of any particular State, but in that generally recognized and long-established law which forms the substratum of the laws of every State." (Hinckley, American Consular Jurisdiction in the Orient, pp. 51–53.)

This is an accurate general definition of the term "common law" as it existed in the United States at the time the eminent jurist gave this opinion, but in order to meet the practical demands of the situation which now confronts the newly established United States court for China it is necessary to descend more into detail and to define the meaning of the term with greater particularity.

When our ancestors came to the New World, they claimed the common law of England as their birthright and brought it with them, except such parts as were judged inapplicable to their new conditions. The common law of England is the unwritten law as distinguished from the written or statute law, and, in its ordinary acceptation, it includes those general customs which pervade the whole realm and particular laws which have been by degrees added thereto.

The common law as introduced into the United States embraces those general principles of the common law of England and those English statutes passed in aid thereof which were applicable to the new conditions and circumstances existing in the American colonies at the date of the change of sovereignty. (Mr. Justice Story, Petterson *v.* Winn, 5 Peters, 242; see also Commonwealth *v.* Knowlton, 2 Mass., 530.)

This is also the view taken by Professor Bishop in his recent work on Criminal Law, wherein he says: "The common law of England, as modified by statutes and including the law as administered in the equity, admiralty, and ecclesiastical tribunals, traveled with the original colonists to this country; and here so much of it as was adapted to their altered situation and circumstances, yet no more, became and thenceforward constituted our American common law. But when it was thus adopted by us we were not a nation. Not even the Revolution, but the Constitution of the United States, gave us nationality. The Revolution and the Constitution did not

annihilate any law with which they were not in conflict. The laws existing when each transpired remained such in their several localities, and so they would have done if the colonies and the States had been politically annihilated. * * * The result is that the nation has no common law within the territorial limits of the States, and all unwritten law within them is State law. Yet in reason it is obvious that there are circumstances under which, not a national common law, but the somewhat varying local laws of each of the several States, constitute an unwritten rule for the tribunals of the United States." (Bishop, New Criminal Law, vol. 1, p. 104; see also Minor, Institutes, ed. 1891, vol. 1, p. 34.)

In America the United States courts when called upon to interpret and apply the common law are not confronted with the difficulty which now confronts this court, because there a United States court has only to administer the common law of the State or States in which the matter pending before the court originated. The common law of each State is usually well defined. Here we have the situation of a United States court sitting outside the territorial limits of the States and outside the territorial limits of the nation itself which is called upon to interpret and apply the common law.

It is readily seen that this gives rise to difficulties which do not exist in the United States courts sitting in America. The difficulty was recognized by the Hon. Caleb Cushing, who, as commissioner, negotiated the treaty of July 3, 1844, and who subsequently, as Attorney-General of the United States, delivered an opinion upon the meaning of the term "common law" as used in the act of Congress of August 11, 1844, which was passed pursuant to said treaty. The term "common law" is used in the statute of August 11, 1848, in the same sense in which it is used in the statute of June 30, 1906.

In the above-mentioned opinion Mr. Cushing discusses the subject as follows: "'The common law.' In this respect, the statute furnishes a code of laws for the great mass of civil or municipal duties, rights, and relations of men, such as, within the United States, are of the resort of the courts of several States. Some general code in these respects became necessary, because the law of the United States —that is, the Federal legislation—does not include these matters and of itself would be of no avail toward determining any of the questions of property, succession, and contract, which constitute the staple matter of ordinary life. For such of the States as were founded in whole or chief part by colonists from Great Britain and Ireland, or their descendants, the law of England, as it existed in each of those States at the time of their separation from Great Britain, with such modifications as that law had undergone by the operation of colonial adjudication, legislation, or usage, became the common law of such independent State. Meantime, in addition to many changes, differing among themselves, which the common law underwent in each of the colonies before it became a State, that common law has been yet more largely changed by the legislation and judicial constitution of each of the States. Hence, it was not enough to enact that the common law should intervene to supply in China deficiencies in the law of the United States. For the question would be sure to arise, What common law? The common law of England at the time when the British colonies were transmuted into independent republican States? Or the common law of Massachusetts, or that of New York, or Penn-

sylvania, or Virginia? For all these are distinct, and in many important respects diverse, 'common law.'" (Opinions of Attorneys-General of the United States, vol. 7, p. 503–504.)

The foregoing brilliant discussion of the subject by Mr. Cushing at once indicates the difficulties of and the necessity for a definite and comprehensive interpretation of the term as used in the law. For the reasons pointed out in the foregoing discussions it is well-nigh impossible to include in a single statement a definition of the common law which will be comprehensive enough to cover the entire field.

It is believed, however, that the authorities warrant the following holding: The term "common law" as used in the statute is interpreted to mean those principles of the common law of England and those statutes passed in aid thereof, including the law administered in the equity, admiralty, and ecclesiastical tribunals, which were adapted to the situation and circumstances of the American colonies at the date of the transfer of sovereignty, as modified, applied, and developed generally by the decisions of the State courts and by the decisions of the United States courts, and incorporated generally into the statutes and constitutions of the States.

I hold, therefore, that the above-mentioned English statute is a part of the common law within the meaning of the term as used in the United States statute establishing this court. Hence the demurrer is overruled.

(Signed) L. R. Wilfley,
Judge of the United States Court for China.

Shanghai, *March 6, 1907.*

United States court for China, term at Shanghai, August, 1907.

In the matter of the probate of the will of Young John Allen.

Judgment.

syllabus.

Domicile under American law is that place which a person has freely chosen for his abode and from which he has no present intention of removing.

Extraterritoriality is that act by which a state, usually by virtue of a treaty, extends its jurisdiction beyond its own boundaries into the territory of another state and exercises the same over its nationals who, for the time being, may be sojourning within the territory of the other state.

There is nothing in the theory or practical operation of the law of extraterritoriality repugnant to or irreconcilable with the application of the American law of domicile by American courts to American citizens residing in a country with which the United States has treaties of extraterritoriality.

Dr. Young J. Allen, having resided in Shanghai for a period of forty-seven years prior to his death, and having expressed the intention of making Shanghai his permanen thome, thereby acquired an extraterritorial domicile in China. The court in administering his estate will be guided by the common law which is in force in China, the place of his domicile at the date of his death, and not by the statutes of Georgia, the place of his domicile of origin.

OPINION.

I. In view of the well-established principle of law that the personal property of a deceased person must be administered according to the law of his domicile, it becomes necessary at the outset to determine where the testator in the will here presented for probate was domiciled at the date of his death.

The facts in this case are as follows: Dr. Young J. Allen was born in the year 1836 in the State of Georgia. In 1860 he moved to China, where he lived continuously for a period of forty-seven years. He died in Shanghai on May 30, 1907. China was the chosen field of his activities, and the instruction of its people in the principles of Christian civilization was his life work. Here his family was reared and now lives. Here his estate, consisting solely of personal property, was accumulated, and it was his oft-expressed intention to make China his permanent home. The will which his legal representatives now present for probate is wholly in his own handwriting and was duly attested by two witnesses. Neither of these witnesses, however, is within the jurisdiction of the court. This being the case, the instrument before the court must be regarded as a holographic will, which, under the common law now in force in China, is valid, but the court is not informed that such a will is recognized by the law of Georgia.

These facts present for consideration one of the most complex and important subjects connected with the operation of the law of extraterritoriality. Succinctly stated, the legal question here involved is: Can an American citizen acquire what may be termed an extraterritorial domicile in China? Can he have a domicile out of the United States in which he is nevertheless governed by the laws of the United States, or must he retain that of the State where he was domiciled before settling in China? In investigating this subject it will be necessary to have a clear conception, first, of the American law of domicile, and second, of the true meaning of extraterritoriality.

II. That a person must always have a domicile somewhere, that no person may have more than one domicile at a time, that every natural person free and sui juris may change his domicile at pleasure, and that civil status, with its attendant rights and disabilities, depends, not upon nationality, but upon domicile, are propositions upon which the authorities are universally agreed. While domicile has been defined by law writers in a variety of ways, yet there are two elements which are found in all definitions, namely, residence and animus manendi, or intention of continued residence. In recent years, however, there has been a tendency on the part of the courts to modify this definition by substituting for the animus manendi, or intention of residing permanently in a certain place, the absence of the animus revertendi, or the intention of returning to the place of former residence.

Vattel defines domicile as "an habitation fixed in some place with the intention of remaining there always." Savigny says, "That place is to be regarded as a man's domicile which he has freely chosen as his permanent abode (and thus for the center at once of his legal relations and his business)." According to Judge Story, "That place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom." Phillimore defines it as "Residence at a particular place accompanied with (positive or presumptive proof of) an intention to remain there for an unlimited time." The definition of Vice-Chancellor Kindersley, while lacking in precision, is perhaps more comprehensive than any of the foregoing. It is as follows:

> That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary pur-

pose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or uncertain) shall occur to induce him to adopt some other permanent home. (Dicey, Conflict of Laws, American Notes by Moore, p. 728.)

Mr. Webster, while Secretary of State, had occasion to consider the law of domicile, and expressed his views on the subject as follows:

The general rule of the public law is that every person of full age has a right to change his domicile; and it follows that when he removes to another place, with an intention to make that place his permanent residence or his residence for an indefinite period, it becomes instantly his place of domicile, and this is so notwithstanding he may entertain a floating intention of returning to his original residence or citizenship at some future period. * * * In questions on this subject the chief point to be considered is the animus manendi, or intention of continued residence; and this must be decided by reasonable rules and the general principles of evidence. If it sufficiently appear that the intention of removing was to make a permanent settlement, or a settlement for an indefinite time, the right of domicile is acquired by a residence even of a few days." (Thrasher's case, Moore, International Law Digest, vol. 3, p. 818.)

The feature here prominently brought out, that domicile will not be defeated by a mere "floating intention" to remove from the locality at some future date, has been adopted by American courts in recent years. (Gilman *v.* Gilman, 52 Maine, 165; 83 Am. Dec., 502.)

In view of the foregoing we feel warranted in stating that under American law a person's domicile is that place which he has freely chosen for his abode and from which he has no present intention of removing.

III. It now becomes necessary to ascertain if there be any reaso why the foregoing principles may not be applied to American citizens residing in a country with which the United States has a treaty of extraterritoriality. This leads to an investigation of the real meaning of extraterritoriality. It is well nigh impossible to give an exact definition of the term, yet its practical application is not difficult of comprehension. Broadly speaking, extraterritoriality is a term used to describe the act by which a state extends its jurisdiction beyond its own boundaries into the territory of another state, and exercises the same over its nationals who, for the time being, may be sojourning in the territory of the other state. It is usually based upon treaty, but the rights and privileges arising therefrom are frequently amplified by usage and sufferance. Extraterritoriality is put in operation mainly by western states in oriental countries where it signifies principally the exemption of the nationals of said western states from local jurisdiction and a corresponding exercise of jurisdiction over them by their own national authorities.

For the purpose of ascertaining the practical operation of the law of extraterritoriality, we shall now trace in brief outline the history of its application in China by two prominent western nations, the United States and Great Britain, under their treaties of extraterritoriality with that country. It will be observed that the treaties under which these two nations operate in China are substantially the same. Great Britain, however, has exercised its rights and privileges under the treaties and developed its law of extraterritoriality in China to a far greater extent than has the Government of the United States.

The first treaty of extraterritoriality between the United States and China was entered into on July 3, 1844, and a second treaty was concluded on June 18, 1858. Articles XXV and XXVII, respectively, of said treaties provide:

All questions in regard to rights, whether of property or of person, arising between citizens of the United States in China shall be subject to the jurisdiction and regulated by the authorities of their own Government.

Congress in 1848 and in 1860 enacted statutes for the purpose of carrying into full force and effect the provisions of these treaties, and to that end extended certain laws to China and created consular courts, vesting them with authority to apply and execute said laws. The body of laws which Congress has extended to Americans in China consists of those statutes of the United States suitable to carry the treaties into effect, the common law, including the law of equity and admiralty, and certain regulations of the American minister to China promulgated to supply the deficiencies in these laws. (U. S. Revised Statutes, sec. 4086.)

On June 30, 1906, Congress passed the act creating this court and vested it substantially with the jurisdiction formerly exercised by the consular courts. (For a complete statement of the history of the American law of extraterritoriality in China, see Hinckley, American Consular Jurisdiction in the Orient.)

Great Britain, on the other hand, by successive foreign jurisdiction acts from 1843 to 1890, by numerous orders in council, by regulations promulgated by the British minister at Peking, and by the decisions of the British supreme court at Shanghai has amply provided for the protection and government of its subjects in China and has probably carried the law of extraterritoriality in China to a higher degree of development than any other foreign power. The extent to which Great Britain has exercised its power under the treaties will appear from an examination of what is known as the foreign jurisdiction act of 1890, and an examination of the jurisdiction possessed by the British supreme court at Shanghai. Section 1 of the foreign jurisdiction act provides:

It is and shall be lawful for Her Majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory.

Section 3 of the act provides:

Any act or thing done in pursuance of any jurisdiction of Her Majesty in a foreign country shall be as valid as if it had been done according to the local law then in force in that country.

And paragraph 2 of section 5 provides:

Thereupon those enactments (described in the first schedule of this act) shall, to the extent of that jurisdiction, operate as if that country were a British possession and as if Her Majesty in council were the legislature of that possession. (53 and 54 Victoria, chap. 37.)

The British supreme court in Shanghai, which was established in 1866, is vested with jurisdiction to execute the laws which Great Britain has extended to its subjects in China. This court is in fact a British court, and in addition to ordinary civil jurisdiction exercises jurisdiction in cases involving admiralty, bankruptcy, and lunacy, and in addition to the ordinary criminal jurisdiction it exer-

cises jurisdiction in some special statutory offenses, such as offenses against the patents and trade-marks acts. (Piggott, Exterritoriality, p. 40.) To such an extent has the British jurisdiction in China been developed that there is almost no legislative or judicial phase of the law in force in England which if necessary in China has not its counterpart here. On the other hand, "common law" and "equity" form the vague and indefinite description of the main law in force in respect to Americans in China.

From the foregoing it will be seen that while the Emperor of China exercises nominal sovereignty over all Chinese territory, including that occupied by the nationals of the United States and Great Britain, yet the jurisdiction of these two countries over their own citizens who reside in China is for all practical purposes as full and complete as if China were in fact territory belonging to these nations.

IV. We come now to the consideration of the main question in this case, namely, whether there be anything in the practical operation of the law of extraterritoriality fatal to the application of the principals of the American law of domicile to Americans residing in China. So far as we are able to ascertain, this question has not been passed upon by the courts of the United States nor has it been made the subject of discussion by the executive branch of the Government. It has, however, received the careful consideration of the courts of last resort of Great Britain with the unlooked-for result that there is now no such thing known to the British law of extraterritoriality as an Anglo-Chinese domicile.

The leading case on this subject originated in Shanghai, and is known as "Tootal's trusts." The facts in this case were as follows: After some previous changes of residence, Tootal, a subject of Great Britain, in 1862 came to reside in Shanghai, and with the exception of some short visits to England for health and business he continued to reside at Shanghai until 1878, the date of his death. It was admitted that some years before his death he had determined to reside permanently at Shanghai, had relinquished all intentions of ever returning to England, and had expressed this intention on a number of occasions. In his will he described himself as a resident of Shanghai, in the Empire of China. The decision of the court was written by Mr. Justice Chitty, who held that British subjects in eastern countries in all cases retain their domicile in that portion of the British Empire in which they were domiciled previously to taking up their abode in an eastern state. The decision is based on the proposition that residence in a "territory" is an essential part of the legal idea of domicile and holds that "there is no authority that an individual can become domiciled as a member of a community which is not a community possessing the supreme or sovereign territorial power." (Re Tootal's trusts, L. R. 23 C. D., p. 532.)

The doctrine thus laid down was followed by the court in the case of Abd-ul-Messih *v.* Farra (13 App. Cases, 431). The decision in this case was written by Lord Watson. "Their lordships," he says, "are satisfied that there is neither principle nor authority for holding that there is such a thing as domicile arising from society and not from connection with a locality. In re Total's trusts is an authority strictly in point, and their lordships entirely concur in the reasons by which Mr. Justice Chitty supported his decision in that case." (See also Maltass *v.* Maltass, 1 Rob. Ecc., 80, and The Indian Chief, 3 Rob. Adm., 29.)

While these decisions fix the law of Great Britain on this subject for the present, the doctrine here laid down has not commended itself to the judgment of the leading British commentators on the subject of extraterritoriality. Sir Francis Piggott, chief justice of Hongkong, in a work which has just come from the press, expresses the opinion "that when the question is again raised it will be found that the principles established by the most recent cases necessitate a reconsideration of the law laid down on the subject by Mr. Justice Chitty." The learned justice then enters upon an exhaustive examination of the principle upon which the foregoing decisions are based, and discusses the same in the following manner:

At the time when many of the definitions were framed the law applicable to exterritoriality was little known and in some cases was not present in the mind of the judges who framed them. Locality and territory were obviously the terms which would be used, the community among which a person settled being as obviously identified with the locality. But it attached undue importance to the word to insist that because "locality" is used in the definitions in cases where there could be no questions as to its fitness, therefore it excluded the idea of "relationship to a community" in the first case that came up for argument, in which the point was whether "relationship to a community" is or is not involved in domicile. * * * The community referred to is of course the community which inhabits a country or a definite locality—in other words, a community which has laws and customs of its own which the government of the locality imposes on all members of it—but the question is whether the reason of the rule, the whole principle on which it is based, do not render it as applicable to an exterritorial community as to a territorial one. On the hypothesis the circumstances may be the same in the one as in the other. A man may set up his home in a treaty port, he may have banished forever the idea of returning to his native country; the animus manendi may be clear, without shadow of doubt, on the hypothesis, too, there is a body of law regulating the community. Why is it impossible, then, for the ordinary principles of the law to be applied and for the personal relations of the permanent members of the community to come under that law permanently as the law of the domicile of their choice; of those who are born members of the community as the law of the domicile of their origin? * * * Linking these two propositions together, it is suggested that the inevitable result is a modification of Lord Watson's interpretation of the law of domicile referred to above on the following lines: The law which regulates a man's personal status must be that of the governing power in whose dominions his intention is permanently to reside, or must be so recognized and established by that governing power as to be in fact the law of the land. (Piggott, Exterritoriality, pp. 228, 230, 232–233.)

The subject has also been carefully gone into by Hall, the celebrated authority on international law, in his work on The Foreign Jurisdiction of the British Crown. He also takes issue with the court in the Tootal's Trusts case, and expresses his views on the subject as follows:

It is perhaps to be regretted that a change in the law is not made which a short order in council could easily effect. Anglo-oriental domicile has its reasonable, it may almost be said, its natural place. Conflicts between the differing laws of England, of Scotland, of the various self-governing colonies are inevitable within British jurisdiction in the East; but it is unnecessary to multiply the points of collision. So long as persons have not identified themselves with the life of a new community they must keep each his own law; but as soon as they have shown their wish and intention to cut themselves adrift from the association of birth they prove their indifference to the personal law attendant on their domicile of origin. There is therefore no reason why simplicity and unity of law should not be gained for British subjects by attributing community in the laws of England to all of European blood. There is also every reason for avoiding very grave difficulties of another kind, which are opened through invariable preservation of the domicile of origin. English families, even in the present day, often remain through more than one generation in oriental countries as their permanent place of abode. Formerly the history of persons whose domicile might become a matter of importance was generally known sufficiently well. Many are now of obscure antecedents and of an origin uncertain among the numerous places from which British subjects can derive. As no domicile can be acquired in an Anglo-oriental community,

it becomes every year more probable that cases will occur in which the determination of the domicile of a father, perhaps of a grandfather, may become necessary, and in which it may be equally impracticable to impute an English domicile or to attribute any other with fair probability. It would be a great advantage that in such cases there should be a fixed rule which should correspond with the obvious facts, and that the courts, instead of searching with infinite trouble and expense for an ancestral domicile should be enabled to find that a domicile had been acquired in the eastern country which carried with it the application of English law; that, in other words, residence in China under English law, with the animus manendi, should imply domicile in China under the condition of the applicability of the special law of the English community established there, as that law is defined by order in council. Theoretically the conception of such a domicile is unobjectionable if once the mind is cleared of the notion, at present dominant, that domicile is the creature of place and intention alone. In Europe it is so, because residence in a place implies subjection to the common territorial law, and to no other; in the East it is not necessarily so, because residence there implies subjection to the law of one or other of several different communities, the personal laws of which receive equal recognition from the territorial sovereign power. Association with place is necessary to domicile; but it is not always the sole determinant factor. In any case, even if the conception of domicile here suggested be anomalous, the convenience of giving effect to it is large enough to excuse a certain sacrifice of logical principle. (Hall, Foreign Jurisdiction of the British Crown, pp. 184–186.)

After a careful consideration of the principles of law on this subject as well as the practical demands of the situation, this court is inclined to give greater weight to the foregoing argument of Mr. Hall than to the line of reasoning adopted by Mr. Justice Chitty in the Tootal's Trusts case. We can see no good reason for holding that a citizen of the United States can not be domiciled in China. Mr. Justice Chitty's decision destroys in their application to China all the definitions of domicile contained in the books. It ignores both of the essential elements of residence and intention. The British courts were correct when they stated that there was no authority for holding that an individual could not become domiciled as a member of a community which was not a community possessing the supreme or sovereign territorial power. This fact, however, is without significance when it is noted that the courts were considering the first case of this character which had ever been presented for judicial determination. At the time the Tootal's Trusts case came up for consideration the British law of extraterritoriality was not so well developed as it is now and the subsequent trend of events has given it a different meaning from what it had at the time the decision was rendered. It was quite natural for the courts thirty years ago to announce that the immiscible character of the two races and the radical difference between the religions, customs, habits, and laws of peoples of the two countries raised a strong presumption against a British subject becoming domiciled in China. At that time it was doubtless the fixed purpose of the majority of those who came to China to sojourn here only a few years and then to return to the country from which they came. This is not the case at present. Many families dwell here now with the fixed purpose of making China their permanent home. There are abundant examples of families permanently located here, and this is likely to become more common in the future. In view of this fact the number of heirs and distributees of foreign citizens decedent in China who live in China in proportion to those who dwell in the countries from which said foreigners came is rapidly growing larger, thus necessitating the adoption of a rule which will meet the practical demands of the situation.

From the standpoint of expediency Hall has very clearly pointed out that conflicts between the laws of England, Scotland, and various

self-governing colonies are inevitable within British jurisdiction in the East. This proposition is too clear to require the support of argument. If this court should adopt the rule laid down by the British courts, such conflicts would be perhaps more numerous and more pronounced in the administration of American law in China than in administration here of the law of Great Britain. The adoption of such a rule would put this court to the necessity in the matter of probating wills of applying the laws of forty-six different Commonwealths, to say nothing of the laws of our Territories and insular possessions. This would be practically impossible. Furthermore, the adoption of the British rule would require this court not only to hold that Doctor Allen, who had resided in China for forty-seven years and who had expressed his intention of residing here permanently, was domiciled in Georgia, but also to hold that his children and grandchildren, some of whom have never been in Georgia, and who never expect to reside there, are nevertheless domiciled in that State. This proposition is too extravagant to be maintained. It requires a greater stretch of the imagination and the adoption of a greater fiction of law to hold that a person can be domiciled in a country where he does not reside and has no intention of residing at any future time than to hold that a citizen of a foreign state can acquire an extraterritorial domicile in a community which is not the community possessing the sovereign territorial power. Every consideration of reason and convenience demands that the American law of domicile be applied by American courts in China.

We hold therefore:

First. That there is nothing in the theory or practical operation of the law of extraterritorialty inconsistent with or repugnant to the application of the American law of domicile to American citizens residing in countries with which the United States has treaties of extraterritoriality.

Second. That Dr. Young J. Allen, having lived in China for a period of forty-seven years and having expressed his intention to live here permanently, thereby acquired an extraterritorial domicile in China; consequently this court in the administration of his estate will be guided by the law which Congress has extended to Americans in China, which is the common law.

(Signed) L. R. WILFLEY,
Judge of the United States Court for China.

SHANGHAI, *August 16, 1907.*

In the United States Court for China at Shanghai, May, 1907.

Re probate of the will of John Pratt Roberts.

SYLLABUS.

The United States has acquired by treaty and established by statute and regulation a jurisdiction in China intended to be adequate to the needs of American citizens resident therein. It is not, however, specifically provided that the courts of the United States in China shall exercise probate jurisdiction, and if such jurisdiction exists it must be by virtue of general power under the treaties and of definite power under the common law extended by act of Congress to citizens of the United States and their property in China.

The common-law courts of England exercised a definite probate jurisdiction previous to and concurrently with the ecclesiastical courts, and the common law of England is at the basis of the American law of administration.

Whereas courts of probate in the United States are created by statute, it is held that by extending to the courts in China common-law powers Congress intended to give these courts powers necessary to put into effect the treaties and to meet the needs of citizens of the United States in China.

The consular courts of the United States in China were therefore made courts of probate; and the United States court for China, having all of the jurisdiction of the consular courts, saving in minor actions, is a court of probate with full powers.

OPINION.

Mrs. Rosalie Adelaide Jackson has filed in this court a document purporting to be the last will and testament of her father, Capt. John Pratt Roberts, an American citizen, who resided in Shanghai at the date of his death, and she has asked that the same be admitted to probate.

The petition raises the question whether this court has jurisdiction in the matter of the administration of estates of Americans decedent in China. In order to determine this question it will be necessary to inquire into the probate jurisdiction of the American consular courts in China prior to the establishment of this court, because the latter has no jurisdiction that was not possessed by the former.

Section 1 of the act of June 30, 1906, creating this court provides that it shall have exclusive jurisdiction in all judicial proceedings whereof jurisdiction may now be exercised by the United States consuls and ministers by law and by virtue of treaties between the United States and China, except in civil cases where the amount involved does not exceed $500 gold and in criminal cases where the punishment does not exceed a fine of $100 or sixty days' imprisonment, or both. In such cases the consuls retain jurisdiction.

There can be no doubt that China intended by the treaties of extraterritoriality to concede to the United States complete jurisdiction over Americans resident in China, and over their property located in China; and it is equally certain that Congress, by enacting the statute of June 22, 1860, pursuant to the terms of the treaties and for the purpose of carrying the same into full force and effect, meant to extend to China a body of laws adequate to the needs of American citizens resident therein.

The treaty of 1858 provides in Article XXVII as follows:

All questions in regard to rights, whether of property or of person, arising between citizens of the United States in China shall be subject to the jurisdiction and regulated by the authorities of their own Government.

A portion of the act of Congress of 1860 embodied in Revised Statutes, section 4085, enacted for the purpose of carrying into full effect the provisions of the treaties, provides in respect to ministers and consuls that "such officers are also invested with all the judicial authority necessary to execute the provisions of such treaties, respectively, in regard to civil rights, whether of property or person."

This brings us to a consideration of the question whether Congress extended to China a system of laws relating to the administration of estates which the above-named officers were to apply.

The answer to this question is found in the provisions of Revised Statutes, section 4086, which reads as follows:

Sec. 4086. Jurisdiction in both criminal and civil matters shall, in all cases be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in

those countries, and over all others to the extent that the terms of the treaties, respectively, justify or require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries; and if neither the common law, nor the law of equity or admiralty, nor the statutes of the United States furnish appropriate and sufficient remedies, the ministers in those countries, respectively, shall by decrees and regulations, which shall have the force of law, supply such defects and deficiencies.

Since neither the general laws of the United States nor the laws relating in particular to extraterritorial jurisdiction contain specific provisions on the administration of estates, and since the minister has issued no regulations on the subject, it follows that the only source from which jurisdiction might be drawn was the common law.

The question now presents itself, Was the law of probate of wills and the administration of estates included in the "common law" which was extended to China by the statute?

The term "common law" has been interpreted by this court to mean:

> Those principles of the common law of England and those statutes passed in aid thereof, including the law administered in the equity, admiralty, and ecclesiastical tribunals, which were adapted to the situation and circumstances of the American colonies at the date of transfer of sovereignty, as modified, applied, and developed generally by the decisions of the State courts and by the decisions of the United States courts, and incorporated generally into the statutes and constitutions of the States. (United States *v.* Biddle, Mar. 6, 1907.)

In order to determine whether the law governing the administration of estates was covered by the common law as thus construed it will be necessary to review the history of the law on the subject with a view to ascertaining, first, whether it was a part of the common law of England and the statutes passed in aid thereof, and, if so, second, whether it has been introduced into the United States as the basis of the American law of probate. On account of the meagerness of the library available to the court at the present time our investigation will be mainly confined to accounts contained in the commentaries of Blackstone and Kent, and Judge Woerner's work on The American Law of Administration. The law governing the administration of estates in England is commonly referred to by text writers and judges as a part of the ecclesiastical law, which was administered exclusively in the ecclesiastical courts. Though there is warrant in the law for this conclusion by reason of the fact that ecclesiastical courts exercised almost complete jurisdiction over estates of deceased persons for a long period of time in England, yet it will be found upon a close examination of the history of the law that the subject was in fact covered by the common law, that estates were administered in the courts of common law, prior to the establishment of the ecclesiastical courts, and that the common law principles and procedure of the common law courts appeared in the history of the administration of estates through all the centuries, and have exercised a profound influence on the American law of administration.

> With us in England [says Blackstone] this power of bequeathing is coeval with the rud ments of the law, for we have no traces or memorials of any time when it did not exist. * * * But we are not to imagine that this power of bequeathing extended originally to all a man's personal estate. On the contrary, Glanvil will inform us that by the common law, as it stood in the reign of Henry the Second, a man's goods were to be divided into three equal parts, of which one went to his heirs or lineal descendants, another to his wife, and a third was at his own disposal. * * * The shares of the wife and children were called their "reasonable" parts. * * * This continued to be the law of the land at the time of magna charta. * * * In the reign of King

Edward the Third this right of the wife and children was still held to be the universal or common law. * * * In case a person made no disposition of such of his goods as were testable, whether that were only part or the whole of them, he was, and is, said to die intestate; and in such cases it is said that by the old law the King was entitled to seize upon his goods, as the parens patriæ and general trustee of the Kingdom. This prerogative the King continued to exercise for some time by his own ministers of justice; and probably in the county court, where matters of all kinds were determined; and it was granted as a franchise to many lords of manors, and others, who have to this day a prescriptive right to grant administration to their intestate tenants and suitors, in their own courts baron, and other courts, or to have their wills there proved, in case they made any disposition. Afterwards the Crown, in favor of the church, invested the prelates with this branch of the prerogative; which was done, saith Perkins, because it was intended by the law that spiritual men are of better conscience than laymen, and that they had more knowledge what things would conduce to the benefit of the soul of the deceased. The goods therefore of intestates were given to the ordinary by the Crown; * * * and as he had thus the disposition of intestates' effects, the probate of wills of course followed. (Book II, p. 491.)

Continuing in chapter seven of the third book of his commentaries, Blackstone, in discussing the jurisdiction of ecclesiastical courts, says:

Testamentary causes are the only remaining species belonging to the ecclesiastical jurisdiction; which, as they are certainly of a mere temporal nature, may seem at first view a little oddly ranked among matters of a spiritual cognizance. And indeed they were originally cognizable in the King's courts of common law, viz, the county courts; and afterwards transferred to the jurisdiction of the church by the favor of the Crown as a natural consequence of granting to the bishops the administration of intestates' effects. * * * At what period of time the ecclesiastical jurisdiction of testaments and intestacies began in England is not ascertained by any ancient writer. * * * It appears that the foreign clergy were pretty early ambitious of this branch of power. * * * It fell within the jurisdiction of the spiritual courts by the express words of the charter of King William I, which separated those courts from the temporal. And afterwards, when King Henry I, by his coronation charter, directed that the goods of an intestate should be divided for the good of his soul, this made all intestacies immediately spiritual causes, as much as a legacy to pious uses had been before. This, therefore, we may probably conjecture, was the area * * * when the King, by the advice of the prelates and with the consent of the barons, invested the church with this privilege. (Book III, p. 95–97.)

As far as we are able to ascertain these deductions of Blackstone are based upon the rulings of the courts in the Hensloe case (Coke's Reports, Part IX, 36 b) and in Snelling's case (Coke's Reports, Part V, 32 b).

The court in Snelling's case held that:

If the ordinary took the goods into his possession, he was chargeable by the common law. And the statute of West. cap. 19 was made in affirmance of the common law.

The history of the law, as recited in the Hensloe case, seems to have met the approval of the annotator of Coke's Reports, who, in commenting upon the same, uses the following language:

It appears to have been a matter of great controversy to whom the probate of wills and granting of administration originally belonged, and whether these matters were entirely of ecclesiastical cognizance; the better opinion seems to be that the probate of testaments did not originally belong to the ecclesiastical jurisdiction.

Again he says:

Wills may be proved, i. e., recorded in any of the courts of common law at Westminster and so likewise in the courts of equity, as the chancery of exchequer; so also in the chamber of the city of London, and divers other cities and towns; and many lordships and manors have an original right of proving wills. And upon the whole it appears, clearly, that the claim and practice of the spiritual courts in this particular was originally a mere usurpation.

This is also the view taken by Professor Stubbs in his work on the Constitutional History of England. He says:

The whole jurisdiction in questions of marriage was, owing to the sacramental character ascribed to the ordinance of matrimony, throughout Christendom a spiritual jurisdiction. The ecclesiastical jurisdiction in testamentary matters and the administration of the goods of persons dying intestate was peculiar to England and the sister kingdoms, and had its origin, it would appear, in times soon after the Conquest. In Anglo-Saxon times there seems to have been no distinct recognition of the ecclesiastical character of these causes, and even if there had been they would have been tried in the county court. Probate of wills is also in many cases a privilege of manorial courts which have nothing ecclesiastical in their composition, and represent the more ancient moots in which no doubt the wills of the Anglo-Saxons were published. As, however, the testamentary jurisdiction was regarded by Glanvill as an undisputed right of the church courts, the date of its commencement can not be put later than the reign of Henry I, and it may possibly be as old as the division of lay and spiritual courts. (Vol. III, p. 344.)

The trust thus vested in the prelates in the course of time was grossly abused. "The common law did not make him [the ordinary], being a spiritual governor, subject to temporal suits for such things. And this was a great defect in the common law." Graysbrook *v.* Fox, I Plowd., 275, 277.)

The popish clergy, says Blackstone, took to themselves (under the name of the church and the poor) the whole residue of the estate of the deceased, after the portes rationabiles, or two-thirds, of the wife and children were divided, without paying even his debts or other charges thereon. This led to the enactment of the Statute of Westminster II, directing the ordinary to pay the intestate's debts so far as his goods would extend. But even after this check to the exorbitant power of the clergy, whereby the ordinary was made liable to creditors, yet the residuum after payment of debts still remained in their hands, to be applied to whatever purpose his conscience should approve. It was the flagrant abuse of this power that again called for legislative interposition; by the Statute of 31 Edward III (c. 11), the estates of deceased persons were directed to be administered by the next of kin of the deceased, if he left no will, and not by the ordinary or any of his immediate dependents. (Woerner, American Law of Administration, Vol. I, p. 316.)

This statute put the representatives of the estates of intestates upon the same footing with respect to suits and accounting as executors and made them officers of the ordinary. By the Statute of 21 Henry VIII (c. 5), the discretion of the ordinary in the appointment of administrators to intestate estates was enlarged, so as to authorize the appointment of either the widow or the next of kin, or both. The Statutes of Distribution, 22 and 23 Charles II (c. 10), and 29 Charles II (c. 30), made distributable among the widow and next of kin, leaving in the hands of the administrator for his own use the third formerly retained by the church, until finally by the first statute of I James II (c. 17) this third was made distributable, as well as the remainder of the intestate estate. (1 Bradford Surrogate Reports, 26; Woerner, American Law of Administration, vol. 1, p. 316; Blackstone, Book II, p. 494, 495.)

The powers of the spiritual courts were thus restricted to the judicial cognizance of the class of cases arising out of the probate of wills, the granting of administration, and the payment of legacies, and thus remained until by the statute creating the court of probate their powers in this respect were wholly abrogated. (20 and 21 Victoria, c. 77.)

We have thus traced in brief outline the history of the law of administration of estates in England, wherein it appears that it was a matter cognizable by the common law and in the common law courts until about the period of the Norman Conquest; that thereafter the juris-

diction over the estates of deceased persons was transferred to ecclesiastical courts, proceedings in which, says Blackstone, "were regulated according to the practice of the canon and civil law, or rather according to a mixture of both, corrected and new modeled by their own peculiar usages and interpositions of courts of common law." (Book III, p. 100.)

It now becomes necessary to consider how far the principles of the common law thus established and the statutes passed in aid thereof were introduced into the various States of the Union, and became incorporated into the American law of administration.

"The English law of devise," says Chancellor Kent, "was imported into this country by our ancestors, and incorporated into our colonial jurisprudence, under such modifications, in some instances, as were deemed expedient." (4 Commentaries, 504.)

In discussing the administration of the estates of intestates the same author makes the following comment:

> To avoid repetition and confusion I shall be obliged to confine myself essentially to the discussion of the leading principles of the English law and assume them to be the law of the several States in all those cases in which some material departure from them in essential points can not be clearly ascertained. * * *
>
> (1) *Of granting administration.*—When a person died intestate in the early periods of the English history his goods went to the King as the general trustee or guardian of the state. This right was afterwards transferred by the Crown to the popish clergy; and, we are told, it was so flagrantly abused that Parliament was obliged to interfere and take the power of administration entirely from the church and confer it upon those who were disposed to a faithful execution of the trust. This produced the Statutes of 31 Edward III (c. 11) and 21 Henry VIII (c. 5), from which we have copied the law of granting administration in this country. * * *
>
> Before the Revolution the power of granting letters testamentary and letters of administration resided in New York, in the colonial governor, as judge of the prerogative court, or court of probates of the colony. It was afterwards vested in the court of probates. (2 Commentaries, 408–409.)

The learned chancellor then proceeds to give an account of the development of the probate courts, and the law of administration in New York, and indicates that the same were modeled after and based upon the principles of the common law.

Judge Woerner, in his chapter on the subject of the probate powers as they exist at common law and under the English statutes, uses the following language:

> The common law of England as affected by the statutes above named [and others relating to probate, which] were enacted before the settlement of the American colonies, is at the basis of the American statutes concerning administration, and the law in the American States in so far as it has not been supplanted by their own statutes. (Woerner, American Law of Administration, vol. 1, p. 316.)

He further states that the origin of our probate system referable to the English spiritual courts is still recognizable in the decisions of some States as to their mode of procedure, although the rules of the civil and common law which govern the ecclesiastical courts are necessarily greatly modified in the adaptation to widely different circumstances and to the spirit of the American people. In New Hampshire courts of probate "have a very extensive jurisdiction not conferred by statute, but by general reference to the law of the land; that is, to that branch of the common law known and acted upon for ages, probate or ecclesiastical law." (Morgan *v.* Dodge, 44 N. H., 255, 258.) In California the superior court is by the constitution invested with jurisdiction over probate matters as a part of its general

jurisdiction the same as its common law and equity powers, and is not, therefore, a statutory tribunal, although controlled in the mode of its action by the code. (Burris *v.* Kennedy, 108 Cal., 331, and Heydenfeldt *v.* Superior Court, 117 Cal., 348.)

While American courts of probate may properly be said to be purely creatures of statute at the present time, yet, as Judge Woerner has pointed out, the law administered by them is unquestionably based upon the common law as administered in the acts of Parliament prior to the date of the transfer of sovereignty. We think there can be no question about the proposition that Congress meant to extend the law of the administration of estates to China under the term "common law" as fully as it meant to extend the law of crimes, which must have been its first consideration in enacting the statutes for the purpose of carrying into force and effect the treaties of extraterritoriality with China.

We hold, therefore, that prior to the inauguration of this court the consular courts of the United States in China had jurisdiction on the matter of the estates of Americans decedent in China in all cases, and that now this court has jurisdiction in such matters when the value of the estate involved is about $500 United States currency, the consular courts retaining their jurisdiction over those estates which are valued at less than this amount.

The will is admitted to probate and letters testamentary will issue forthwith.

(Signed) L. R. Wilfley,
Judge of the United States Court for China.

Shanghai, China, *May 15, 1907.*

United States court for China, Shanghai, March 18.

Reuben Rosser McDermid v. Alice Flynn McDermid.

Divorce Proceedings.

This is an action for divorce in which petitioner prays for an absolute divorce, the custody of the minor children, and for general relief. Petitioner alleges adultery as the ground for divorce. Defendant demurs to the petition on the ground that this court is without jurisdiction to hear and determine the case.

This raises the question whether the United States court for China has authority to hear and determine matrimonial causes, including the power to grant absolute divorce and to decree separation from bed and board.

The jurisdiction of this court is defined in sections 1 and 4 of the act of June 30, 1906, creating the court. Section 1 of said act provides that:

> A court is hereby established to be called the United States court for China, which shall have exclusive jurisdiction in all cases and judicial proceedings whereof jurisdiction may now be exercised by United States consuls and ministers by law and by virtue of treaties between the United States and China.

(Jurisdiction in small civil and criminal cases excepted.) Section 4 of said act provides that "The jurisdiction of said United States court, both original and on appeal, in civil and criminal matters, and also the jurisdiction of the consular court in China, shall in all cases

be exercised in conformity with said treaties and the laws of the United States now in force in reference to the American consular courts in China, and all judgments and decisions of said consular courts, and all decisions, judgments, and decrees of said United States court shall be enforced in accordance with said treaties and laws. But in all such cases when such laws are deficient in the provisions necessary to give jurisdiction or to furnish suitable remedies, the common law and the law as established by the decisions of the courts of the United States shall be applied by said court in its decisions and shall govern the same, subject to the terms of any treaties between the United States and China."

It will thus be seen that the jurisdiction of this court is for all practical purposes the same as that exercised by the United States consuls and ministers in China prior to June 30, 1906, and no more.

It now becomes necessary to determine the jurisdiction in judicial matters of the United States consuls and the United States minister in China prior to the above-mentioned date. This involves an examination of the provisions of the treaties between the United States and China and the statutes of the United States passed pursuant thereto. The treaties between the United States and China of July 3, 1844, and June 18, 1858, contain the following provision:

> All questions in regard to rights, whether of property or person, arising between citizens of the United States in China, shall be subject to the jurisdiction and regulated by the authorities of their own government. (Sections 15 and 27, respectively.)

The "authorities" of the United States Government, referred to in the treaties, and the jurisdiction which they shall exercise are named and defined by an act of Congress passed for the purpose of carrying into effect the terms of said treaties. This subject is covered by sections 4083, 4085, and 4086 of the Revised Statutes, which read as follows:

> SEC. 4083. To carry into full effect the provisions of the treaties of the United States with China, Japan, Siam, Egypt, and Madagascar, respectively, the minister and the consuls of the United States, duly appointed to reside in each of those countries, shall, in addition to other powers and duties imposed upon them, respectively, by the provisions of such treaties, respectively, be invested with the judicial authority, herein described, which shall appertain to the office of minister and consul, and be a part of the duties belonging thereto, where and in so far as the same is allowed by treaty.
>
> SEC. 4085. Such officers are also invested with all the judicial authority necessary to execute the provision of such treaties, respectively, in regard to civil rights, whether of property or person; and they shall entertain jurisdiction in matters of contract, at the port where, or nearest to which, the contract was made, or at the port at which, or nearest to which, it was to be executed, and in all other matters, at the port where, or nearest to which, the damage complained of was sustained, provided such port be one of the ports at which the United States are represented by consuls. Such jurisdiction shall embrace all controversies between citizens of the United States or others provided for by such treaties, respectively.
>
> SEC. 4086. Jurisdiction in both criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as it is necessary to execute such treaties, respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries, and over all others to the extent that the terms of the treaties, respectively, justify or require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries; and if neither the common law, nor the laws of equity and admiralty, nor the statutes of the United States furnish appropriate and sufficient remedies, the ministers in those countries, respectively, shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies.

It will be seen from these statutes that the jurisdiction, formerly exercised by consuls and ministers and now exercised by this court, to hear and determine causes, is drawn from four sources:

First. The provisions of the treaties between the United States and China;

Second. Those statutes of the United States suitable to carry said treaties into effect, which have been extended over citizens of the United States in China;

Third. The common law, including equity and admiralty; and

Fourth. The rules and regulations of ministers having the force of law, promulgated to supply defects and deficiencies in the laws of the United States and in the common law.

I. It will be observed that the treaties merely outline in a general way the authority which shall be exercised by the Government of the United States in China over American citizens, leaving it to Congress to determine what tribunals shall exercise said authority, and the laws which said tribunals shall apply. It was manifestly the purpose of China to concede to the United States absolute and unqualified extraterritorial jurisdiction over her citizens in China. The question to be determined is how far Congress has gone in extending a system of jurisprudence to American citizens in China. This requires an examination of the above-mentioned statutes.

II. Turning now to a consideration of the statutes of the United States which have been extended to China, we find that no mention is made of the matter of granting divorce. It is but natural that this is so, because in the United States the regulation of all matters relating to the status of marriage is left to the States, in conformity with the provisions of Article X of the amendments to the Constitution, which provide that—

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

It does not follow, however, that because Congress has not legislated on this subject for the people who live in the States, that it is without constitutional power to pass laws relating thereto applicable to American citizens living in China. It is sufficient to note here that up to the present time it has not done so.

III. We now pass to a consideration of the common law as a source of authority for the exercise of jurisdiction over matrimonial causes. The term common law as used in the statute has been interpreted by this court in the case of the United States *v.* Biddle to mean:

> Those principles of the common law of England and those statutes passed in aid thereof, including the law administered in the equity, admiralty, and ecclesiastical tribunals, which were adapted to the situation and circumstances of the American colonies at the date of transfer of sovereignty, as modified, applied and developed generally by the decisions of the State courts and decisions of the United States courts, and incorporated generally in the statutes and constitutions of the States.

It now becomes necessary to examine the provisions of the common law on the subject of divorce and "judicial" separation. According to Blackstone the English law recognized two kinds of divorce, the one total and the other partial—the one a vinculo matrimonii and the other merely a mensa et thoro.

> The total divorce must be for some of the canonical causes of the impediment existing before marriage, for in the case of total divorce the marriage is declared null, as having been absolutely unlawful ab initio, while divorce a mensa et thoro is nothing

more than separation, which does not nullify the marriage. With us in England adultery is only a cause for separation from bed and board. (1 Blackstone's Commentaries, p. 141.)

According to the earlier law of England, a marriage valid at the time of its solemnization was held to be indissoluble. Conjugal infidelity only furnished a ground for separation, but nothing short of death could release the nuptial bond. A complete annulment of the tie could only be obtained by the establishment of some antecedent impediment, such as undue consanguinity, physical incompetence, or mental incapacity. Until about the commencement of the eighteenth century the ecclesiastical courts exercised exclusive jurisdiction over the subject of divorce. The ecclesiastical courts refusing to grant divorce a vinculo, even in cases of greatest conjugal delinquency, induced applications to Parliament, and it is said the first genuine example of a dissolution of the nuptial tie was in the case of the notorious mother of the highly gifted but unfortunate poet, Savage—the Countess of Macclesfield. Since that time the Parliaments have exercised the power of annulling absolutely the marriage bond. (Wright *v.* Wright's Lessees, 14 American Decisions, 725.)

The authorities all agree that prior to 1776 all judicial power to deal with divorce causes was vested exclusively in the ecclesiastical courts, and such power was limited to separation from bed and board, and that prior to that date all power of absolutely annulling the marriage bond was exercised by Parliament alone. The courts also hold uniformly that the power to grant a divorce in the United States is a statutory and not a common-law power. It is usually vested in courts of law and equity, although in a few cases probate courts have been vested with this authority. In the absence of constitutional provisions or express legislation, no American tribunal has jurisdiction to grant divorce. (Sharon *v.* Sharon, 69 Cal., 209.)

This disposes of the common-law authority for granting an absolute divorce, but leaves to be considered the question whether there is sufficient warrant in the common law as above defined to authorize this court to grant a separation from bed and board. This involves a consideration of the question whether the law on this subject, as administered by the ecclesiastical courts, constituted a part of the common law of England, which was introduced into the United States at the date of the change of sovereignty. As above pointed out, at the time we derived our common law from England, the ecclesiastical or church courts had exclusive jurisdiction of causes relating to marriage and divorce. It was a dogma of the church that marriage was a divine institution, a sacrament not to be dissolved by divorce unless by direction of the head of the church. Marriage was, therefore, within the control of the church courts, and the civil courts had no jurisdiction. Whilst the principles of the common law which were applicable to the colonies were introduced into the United States and became the common law of the various States, yet not all of the ecclesiastical law was suited to the conditions and wants of the people. There were no ecclesiastical courts to administer the ecclesiastical law, and courts of equity and common-law jurisdiction had no jurisdiction to bear and determine divorce causes until it was conferred upon them by statutes, and the statutes on the subject subsequently passed did not confer the full jurisdiction of the ecclesiastical courts upon the State courts, but only jurisdiction to grant divorce and annul marriage in certain cases specified therein. The ecclesiastical law as a whole was not, therefore, adopted as a part of our common law. The jurisdiction conferred by the statutes was special and limited to the causes for divorce enumerated therein. Bishop, in his work on Marriage and Divorce, contends that the fact that there were no courts in the colonies in which to administer the law of divorce as established

in the ecclesiastical courts is not a sufficient reason to warrant the conclusion that the common law of divorce did not follow the colonists to America. He says:

As just stated in brief, English colonists to an uninhabited country carry with them to their new locality their English laws, except such as are inapplicable to their altered relations and circumstances. This general doctrine, in its applicability to this country, is everywhere recognized by our courts, and in most of the States it has been confirmed either in the written constitution or by legislative enactment. Nor is it material to this doctrine in what tribunal, in England, a law in question is there administered. Since every law from the mother country presents itself to a colony separated from the court of its origin, never, in reason, can its adoption or rejection depend on the name or constitution of such court. In accord with this view is the language of the books, "all laws," and, though in some of the American cases the term "common law" is used, the broad meaning of the term, not its narrow and technical one, is intended. Moreover, the courts of England have specifically held that the matrimonial law of the ecclesiastical tribunals is a branch of the law which the colonists take with them.

The position of Professor Bishop, however, is controverted by Chancellor Sanford in the case of Burtis *v.* Burtis. (1 Hopkin's Chancery, 557, New York; 14 American Decisions, 563.) This is the leading case on the question now under consideration, and Chancellor Sanford treated the subject in an exhaustive manner. Since this court is inclined to adopt the views announced by the learned chancellor, his opinion will here be quoted extensively. He says:

The colony of New York never had any court possessing jurisdiction of matrimonial causes or power to grant divorce. No statute defining the causes of divorce or authorizing divorces in any case whatever was ever enacted by the legislature of the colony. Some special applications for divorces were made to the colonial legislature, but all such applications were refused. The governor of the colony, with the consent of the council, had power to establish courts of justice, and all the courts of the colony derived their origin from this source of authority; but no court having cognizance of matrimonial causes or divorces was ever established in the colony. No court of the colony exercised very much jurisdiction and no law concerning divorce was ever enacted by the colonial legislature. It thus appears that the law of England concerning divorces and matrimonial causes was never adopted by the colony of New York. It was not adopted in fact or in practice, and it was never the law of the colony. By the constitution of the State adopted in 1777 such parts of the common law of England and the statute law of England and Great Britain and of the acts of the legislature of the colony as together formed the law of the colony on the 19th day of April, 1775, were declared to be the law of this State. The law of the colony was thus adopted as the law of the State. The law of England concerning divorces and matrimonial causes not forming a part of the law of the colony, did not become the law of the State. I can not admit that we have any other code on the same subject and that the laws of England concerning divorces are also laws of this State. The English law concerning divorces and causes of divorce, as it exists now and as it existed while this State was a colony, is chiefly the ecclesiastical law and not the common law of that country. It is administered by judges and courts whose jurisdiction has never existed either in the State or the colony of New York, and it was evidently regarded by our ancestors of the colony and of the State as no part of the common law which they adopted. Our statutes are clearly original regulations, intended to authorize divorces in cases in which no divorce could before be obtained. They define the causes for which divorces shall be granted, they give jurisdiction of those cases to this court, and they give no other jurisdiction. The specified cases are, with some differences, causes of divorce by the laws of England; but these statutes are evidently founded on the supposition that the causes of divorce which they define were not causes of divorce by any preexisting law in force in this State. In every view of these acts of our legislature they are substantive laws, authorizing divorces in the cases which they specify, and not authorizing divorce in any other case or for any other cause.

In our view the reasoning of the learned chancellor as above set forth is entitled to greater weight than the ingenious and plausible argument of Professor Bishop and appears to be better supported by the authorities.

That no court has a right to take jurisdiction of matters relating to the status of marriage unless such jurisdiction has been specially conferred by statute is a principle firmly established in American law and universally applied by American courts.

A divorce can not be had except in that court upon which the State has conferred jurisdiction, and it can be had for those causes only, and with those formalities only, which the State has by statute prescribed. (Dennis *v.* Dennis, 68 Connecticut, 186; De Meli *v.* De Meli, 67 Howard Pr., N. Y., 20.)

In view of this rule and the fact that all of the States have dealt with the subject of matrimonial causes originally and with such striking lack of uniformity, we are of opinion that the law of divorce as administered by the ecclesiastical courts of England has not been adopted generally by American tribunals as the basis of their decisions on the subject of divorce, and has not formed the substratum of the law of divorce as enacted by the various States; hence we conclude that said ecclesiastical law did not become a part of the common law within the meaning of that term as it has been interpreted by this court.

IV. This leaves for consideration the question whether the regulations of the minister on the subject of divorce conferred jurisdiction upon this court to hear and determine matrimonial causes. Without entering upon a discussion of the question whether Congress has the constitutional right to delegate its legislative powers to a United States minister to a foreign country, it is sufficient for our purposes to inquire if our minister has actually promulgated rules and regulations prescribing causes for divorce in China. The regulations of the minister on this subject are found in section VII of the consular court regulations of 1864, and are as follows:

SECTION VII, DIVORCE.

46. Libels for divorce must be signed and sworn to before the consul, and on the trial each party may testify.

47. The consul, for good cause, may order the attachment of libeller's property to such an amount and on such terms as he may think proper.

48. He may also, at his discretion, order the husband to advance to his wife, or pay into court, a reasonable sum to enable her to prosecute or defend the libel, with a reasonable monthly allowance for her support, pending the proceedings.

49. Alimony may be awarded or denied the wife on her divorce at his discretion.

50. Custody of the minor children may be decreed to such party as justice and the children's good may require.

51. Divorce releases both parties, and they shall not be remarried to each other.

52. Costs are at the discretion of the consul.

It will be seen from the foregoing regulations that they do not undertake to prescribe the causes for which divorce may be granted, but purport to be little more than rules of procedure.

It thus appears (*a*) that our treaties with China contain no specific provision on the subject of divorce; (*b*) that the statutes of the United States which have been extended to China are also silent on this subject; (*c*) that the common law in force in China does not embrace the subject of matrimonial causes, and (*d*) that the minister has not issued regulations prescribing grounds on which divorce or judicial separation shall be granted.

In view of the foregoing facts, and the rule universally adopted by the courts of the United States that courts have no jurisdiction

in matrimonial causes except when specifically conferred by statute, we hold that the United States court for China is without jurisdiction to hear and determine matrimonial causes.

The demurrer is sustained and plaintiff's petition is dismissed with costs.

(Signed) L. R. WILFLEY,
Judge of the United States Court for China.

United States Court for China.

Frazar & Co. v. *Boston S. S. Co. and Boston Towboat Co.*

JUDGMENT.

The question involved in this case is one of fact and not law. The evidence produced at the trial disclosed the following facts:

On the 24th day of September, 1906, the Centennial Milling Company an American corporation, shipped from Tacoma, Wash., to its consignee, Frazar & Co., at Shanghai, China, 100,000 sacks of flour, on defendant's steamship *Tremont.* It was admitted of record by counsel that the said "steamship *Tremont,* of the Boston Steamship Company, when she left Tacoma, was in all respects seaworthy, and properly manned, equipped, and supplied." Section 10 of the bill of lading on which the flour was shipped provides that "The steamship company shall not be accountable for loss or damage from * * * the insufficiency of packages." When the cargo reached Frazar & Co., it was found that 3,523 bags were in a damaged condition. The flour was packed in bags made of the material known as "standard quality." This so-called "standard" bag is in general use by all shippers engaged in the flour trade between America and China. The value of the flour was 1.40 taels per bag. Plaintiffs refused to receive the damaged bags and sued for 4,932.20 taels, the value of all the damaged bags at 1.40 taels per bag. The court ordered the damaged cargo sold at public auction and it brought 2,040 taels. The charges incident to said sale were 310.97 taels, making an actual loss of 3,203.17 taels. The dispute arises over the facts which caused the loss.

The defendants attempt to exonerate themselves by showing that the loss was due to "the insufficiency of the packages;" that is to say, to the inferior quality of the bags in which the flour was shipped. The plaintiffs, on the other hand, contend that the loss was occasioned by the careless and reckless manner in which the flour was unloaded at Woosung.

The support of their contention defendants introduced a number of witnesses who testified that in their opinion the loss was occasioned by the inferior quality of the bags. Mr. P. Chambers, in charge of the Shanghai and Hongkong wharf at Pootung, stated that his observation was that bags in which flour was shipped had become decidedly inferior during the last five or six years. He stated that they are not strong enough now for the ordinary wear and tear of loading and discharging, and that $3\frac{1}{2}$ per cent of breakage is not much these days. Such loss does not indicate careless handling, but may be expected from the weakness of the bags used. He also testified that at the present time all flour cargoes are carefully handled.

Mr. William Paulsen, Lloyd's surveyor at Shanghai, also testified on behalf of the defendants. He stated that the bags in which flour is packed had been growing thinner in recent years, and that the percentage of breakage nowadays is higher than 3 per cent. He attributed the loss sustained in the present case to the weakness of the bags in which the flour was shipped. Two bags of flour which were taken from the cargo in question were exhibited in court, and Messrs. Chambers and Paulsen were called upon to examine and express their opinion in regard to the quality of the same. Mr. Chambers said that the two bags produced were the usual style of bags now used for packing flour, and Mr. Paulsen, after testing them, pronounced one of them "extraordinarily strong" and the other, he said, was not quite so strong. Defendants next introduced Mr. Alfred Cartwright, wharfinger in charge of the Eastern wharf at Pootung, who testified that he was in charge of the unloading of this flour from the lighters. The condition of the cargo as landed from the *Tremont,* he said, was very bad. Many of the bags were broken. He further stated that he had never seen a cargo in which so many bags were broken. Mr. T. H. Harris, acting general manager of the China Merchants wharves, said he saw part of the cargo in question discharged. His opinion was that the cargo was in a very ruinous condition. He saw many of the bags broken; and although they were handled carefully while under his observation, others were breaking. His conclusion was that the bags containing the flour were of inferior quality.

Plaintiffs then put on stand Messrs. W. S. Emens and G. W. Brush in rebuttal and in support of their contention that the damaged cargo resulted from the reckless and careless manner in which the cargo was discharged at Woosung. Mr. Emens, manager of plaintiffs' firm, stated that he had been in business in China for twelve years, during which time he had had considerable experience in the importation of flour. He stated that the material used in the bags was what is known as "standard quality" and has been in use here for years, and he expressed the firm and emphatic opinion that there had been no deterioration in the quality of bags, as alleged. He also testified that the percentage of breakage of the bags of flour in the cargo involved in this suit was greater than that of any previous or subsequent shipment of the same brand of flour handled by his firm. He testified that on several occasions he had imported flour from the same mill, packed in the same manner, for Tientsin and Newchwang, and in each of these instances the percentage of breakage was so small as to be a negligible quantity, although, he said, discharging at these two ports is attended by greater difficulties than at Shanghai or Woosung. Mr. Brush was next called. He stated that he was on board the *Tremont* for three hours during a day on which she was discharging cargo. He was there to look after the discharge of the cargo belonging to his firm of M. J. Connell & Co. He stated that both slings and slides were used in discharging. The use of slides was not confined to the lower cargo parts of the ship, but slides were used from the upper ports and decks as well. The ship had on board both wheat and flour, and although the wheat was heavier than the flour, both were discharged into the lighters indiscriminately, wheat being piled on top of flour and flour on top of wheat. His attention was called to the fact that in one hold 40 sacks of flour fell from the

sling at one time and all were broken. He called this incident to the attention of the chief officer, who replied that the ship was in a hurry and that the discharging force were under rush orders and were working day and night. He saw bags of flour split as they slid down into the lighters, and did not see anyone superintending the coolies in the lighters. His firm lost 1 per cent of its cargo on this occasion, which was greater than had ever been previously sustained.

The foregoing is in substance the evidence adduced at the trial of this case. It will be observed that there is a conflict of testimony on two vital points, viz, (*a*) the percentage of loss resulting from breakage of bags at the present time in Shanghai; and (*b*) the probable cause of the loss sustained in the shipment under consideration. Messrs. Chambers and Paulsen state that the usual loss from breakage is from 3 to 3½ per cent. The other four witnesses disagree with these gentlemen and place the percentage at a much smaller figure. The actual loss in this case was about 2 per cent, and Mr. Harris (defendants' witness) considered the cargo in a "ruinous condition" when it reached the wharf. Mr. Cartwright (defendants' witness also) testified that "he had never seen a cargo in which so many sacks were broken." Mr. Brush considered 1 per cent large, and Mr. Emens's experience was that losses from breakage were ordinarily a negligible quantity. In view of this testimony and the probabilities of the case, the court is inclined to think that the estimate of Messrs. Paulsen and Chambers is too high. Such losses would impair if they would not destroy the trade, and it does not stand to reason that shippers would tolerate such a condition, especially in view of the fact that only a part of loss thus sustained, if applied to the improvement of the quality of the bag, would produce an article of unquestioned strength.

The court is disposed to accept the opinion of the other four witnesses, especially of witnesses Emens and Brush, to the effect that the actual loss from breakage alone is usually less than 1 per cent.

This brings us to a consideration of the second question in which the testimony of witnesses is at variance, namely, as to the sufficiency of the bag used. Was it of inferior quality or not? On the one hand, we have the testimony of defendants' four witnesses that the bage were of inferior quality. On the other hand, Messrs. Emens and Brush state that they were strong enough to meet the demands of the trade. Corroborating the position of Messrs. Emens and Brush we have two significant facts: First, that the sample bags which were exhibited in court were strong and of good quality (one was of extraordinary strength, in the opinion of defendants' witness Paulsen); and second, that bags used were of the quality known as "standard." This last-mentioned fact, is, in the opinion of the court, entitled to great weight and goes far toward determining the fate of this controversy.

What does the fact that a bag is of "standard" quality signify? It means that merchants who are engaged in the flour trade between America and China have adopted as "standard" that quality of bag which experience has demonstrated to be the best adapted to the uses of the trade. Commerce is a severely practical institution. The customs of merchants and the laws of trade are usually based upon experience and sound judgment. The "standard" bag thus adopted by merchants will not likely be changed until experience

demonstrates that it is no longer fitted for the purposes for which it was adopted. The testimony before the court is not such as to justify a ruling to the effect that the so-called "standard" bag in general use here is of inferior quality and insufficient for the demands of the trade. Hence defendants' theory that the loss in this case resulted from insufficient packing due to the inferior quality of the bag used is rejected by the court.

Turning now to the contention of plaintiffs that the loss was occasioned by careless and reckless handling at the port of discharge, we have the uncontradicted testimony of Mr. Brush, who was on the *Tremont* when the cargo in question was discharged and who was an eyewitness to the manner in which it was handled. He states that the cargo was unloaded in great haste and in a careless manner. In his testimony above outlined he gives a number of particular instances, all of which go to show that his testimony is entitled to weight and that the facts he relates therein are probably true.

In view of the foregoing testimony and all of the circumstances surrounding the case, the court is convinced that the loss in this case was occasioned by the careless and reckless manner in which the cargo was unloaded at the port of Woosung.

Judgment is therefore rendered in favor of plaintiffs in the sum of 3,203.17 taels and costs.

(Signed) L. R. WILFLEY,
Judge of the United States Court for China.

SHANGHAI, *March 7, 1907.*

United States Court for China.

Civil case.—Hillebrandt & Co. v. Zimmermann & Co.

"DELIVERY" BY CARRIERS AT SEA DEFINED.

JUDGMENT.

This is a suit to recover 1,003.20 rubles, the value of the shortage on a cargo of flour shipped by plaintiff from Shanghai to Vladivostok by defendants' steamship *Hennamet.* Defendants deny liability and file a set-off of $393.09 Mexican. The testimony disclosed the following facts: During March, 1906, plaintiff shipped 6,900 sacks of flour from Shanghai to Vladivostok by defendants' steamer *Hennamet.* Plaintiff, Mr. A. Hillebrandt, went to Vladivostok on the *Hennamet* for the purpose of looking after and disposing of his cargo. Mr. M. A. Katz also went to Vladivostok on the *Hennamet* as a representative of Zimmermann & Co. Six thousand nine hundred sacks of flour were loaded on board the *Hennamet* at Woosung about the 1st of March, 1906. The contract of shipment was an ordinary bill of lading in which A. Hillebrandt was consignee. The *Hennamet* arrived at Vladivostok on or about the 10th of the month. The vessel remained in the harbor for two days and then went alongside the wharf and discharged her cargo. The vessel's entire cargo was discharged in about seven days. Mr. Hillebrandt proceeded to sell his cargo immediately, and before he left Vladivostok, which was about the 17th of March, he had sold the entire cargo and delivered

from the wharf all except a small portion of it. He testified on this point as follows:

> I had disposed of all the flour before it was discharged. I took delivery of it as fast as it was discharged. I saw my cargo out on the jetty. It was four or five days before I received the last of it. I left for Shanghai the same day on which the last of cargo was discharged.

The testimony is conclusive that all of the ship's cargo was discharged on the wharf at Vladivostok while Mr. Hillebrandt was in Vladivostok. No evidence was produced to show what length of time intervened between Mr. Hillebrandt's departure from Vladivostok and the date on which the parties to whom he had sold the last of his flour applied for the same at the wharf. Mr. Katz testified that part of plaintiff's cargo remained on the wharf for a period of two weeks, during which time he took all the precautions possible under the circumstances to protect from theft and exposure. The testimony shows that there is no custom in Vladivostok under which merchants are allowed a certain time in which to remove their goods from the wharves. The rule is that they must take charge of their cargo at once. When Mr. Hillebrandt arrived in Shanghai he received notice from Vladivostok of a shortage of 456 bags. He returned to Vladivostok about a month later and verified the shortage.

The foregoing facts give rise to two questions, as follows:

First. Was the discharge of plaintiff's cargo on the wharf at Vladivostok a delivery within the meaning of the law relating to the duties and liabilities of carriers at sea?

Second. If this question be answered in the negative, are defendants liable for the shortage disclosed by the evidence in this case?

It becomes necessary to determine what, in the eye of the law, constitutes a complete delivery. The authorities discuss this subject under two heads, viz, the duties of a common carrier in those cases (*a*) where the consignee is not present, and (*b*) where he is present at the point of destination, to take over the goods upon arrival. In this instance it is not necessary to consider the first set of cases, because the plaintiff, Mr. Hillebrandt, went along with the cargo on the *Hennamet* for the purpose of taking charge and disposing of it at Vladivostok. The question of what constitutes delivery in the second set of cases, namely, when the consignee has due notice and is present at the point of destination when the goods arrive, was settled by the Supreme Court of the United States in the case of Richardson *v.* Goddard, reported in 23 Howard, 28. The facts in that case were as follows: The barque *Tangier* arrived in the port of Boston on the 8th of April with a cargo of cotton. She commenced the discharge of her cargo on a Monday, and on the same day the master gave notice to the consignees of his readiness to deliver the goods. On Wednesday all of the cotton which had been unloaded on Monday and Tuesday was removed except 325 bales, which remained on the wharf over night. The unloading was completed on Thursday at 5.10 p. m. About 3 p. m. of the next day the cotton remaining on the wharf was consumed or damaged by an accidental fire. The contract of the carrier was to deliver in like good order and condition at the port of Boston unto Goddard & Pritchard. The court there decided that by the commercial and maritime law it is a settled rule that a carrier by water shall carry from port to port and from wharf to wharf, and is not bound to deliver at a warehouse or business place of the con-

signee. It also held that goods delivered at a proper wharf at a proper time with notice to consignee is a good delivery. In Goodwin *v.* The Baltimore and Ohio Railroad (50 New York, 149) the court held that—

where the proper consignee of the goods is present, accepts the consignment, and pays the freight and the goods are accordingly unloaded with reasonable opportunity for him to remove them, custody is transferred from the carrier and responsibility devolves upon the consignee to secure them from the weather and depredation, and otherwise make disposition of them. (Schouler, Bailments and Carriers, sec. 504.)

The text writers take a similar view of the subject as that laid down by the courts.

The rule long since mentioned in Great Britain [says Schouler], where goods are brought by water, is that delivery on the usual wharf will discharge the carrier, and such also is the American rule. This is particularly true of transportation between foreign ports, which for centuries has involved the use of bills of lading. The usage at the present day generally requires the consignee to take off his merchandise in lighters from the vessel's side on its arrival in port; otherwise the carrier shall land the goods on the wharf and finally shall warehouse them if they are not called for in a reasonable time. Personal delivery dispenses with "personal notice" and affording "reasonable opportunity" to remove the goods. (Schouler, Bailments and Carriers, sec. 511; see also Thompson *v.* Sullivan, cited, sec. 359.)

All of the elements of delivery as defined by the foregoing authorities are present in this case, and I hold that the cargo in question was legally delivered to plaintiff at Vladivostok when it was discharged upon the wharves in the presence of Mr. Hillebrandt himself, and that the custody thereof and liability therefor then passed from defendants to plaintiff.

In view of this holding it is not necessary to consider the second proposition above mentioned as to the duties and liabilities of a carrier after the cargo had been discharged upon the wharf, had there not been a personal delivery to the consignee.

This leaves to be disposed of the matter of the set-off contained in defendants' answer. A set-off is a counterdemand generally of a liquidated debt growing out of a separate transaction for which an action might be maintained by the defendant against the plaintiff to recover a judgment in his own favor. Such is the character of the cross action in this case. This court has no jurisdiction to give a judgment in such a case, because it is without power to enforce judgment against anyone other than an American citizen. It has been held by United States Attorney-General Speed that in cases between a foreign plaintiff and an American defendant, where the foreigner establishes his claim against the American, the latter may plead a counterdemand in an amount equal to or less than the amount of the claim of the foreigner, and the court will allow the same. But in no instance will the court give affirmative judgment against a foreign litigant in any amount.

Courts derive their powers from the law and not the consent of the parties. * * * Courts can not take jurisdiction of matters except as authorized by law. * * * A jurisdiction to hear and determine a complaint made by the subject of another country against a citizen of the United States does not confer jurisdiction for a cross action in a consular court. So far as set-off is a defense, it may be pleaded. I am of opinion, therefore, upon the case submitted that a consular court could not entertain the plea of set-off further than the extent of the claim asserted by the Dutch merchant; and, secondly, that the consular court could not, under the treaty with Japan and the statutes of the United States, render a judgment over against a person of foreign birth not a citizen of the United States in Japan. (11 Opinions Attorney-General, 476.)

Petition of plaintiff is denied and defendants' plea of set-off is dismissed without prejudice. Plaintiff will pay the costs of this suit.

(Signed) L. R. WILFLEY,
Judge of the United States Court for China.

SHANGHAI, *March 6, 1907.*

United States court for China.

M. S. Friede v. Getz Brothers & Co., a corporation.

JUDGMENT.

It appears from the evidence in this case that Getz Brothers & Co., a California corporation, defendant herein, entered into two contracts of agency with M. S. Friede, plaintiff herein, who is a citizen of the United States, as follows:

On the 4th day of October, 1905, said defendant agreed to appoint said plaintiff its sole agent in the territory known as Manchuria and Siberia for the sale of Pabst beer, St. Charles evaporated cream, packing-house products manufactured by Armour & Co., and other goods for which the defendant was agent, the profits from the sale of which were to be divided equally between plaintiff and defendant. Plaintiff agreed to sell annually under this contract not less than 15,000 barrels of Pabst beer, 15,000 cases of St. Charles evaporated cream, and an amount of Armour & Co.'s products not less than the amount of similar products sold by Swift & Co. Defendant agreed to furnish at his own expense a man to be located in Manchuria and Siberia who should act in the interests of the business covered by the contract, and also agreed not to sell during the life of the contract any lines of goods which might compete with those lines of goods mentioned therein. Plaintiff agreed to devote his time exclusively to the sale of the brands of goods covered by the contract and to render a prompt account of all sales made. (Exhibit I, p. 69.) At the end of the first year this contract was canceled.

Thereafter, on the 21st day of December, 1905, plaintiff and defendant entered into a contract whereby the plaintiff agreed to sell certain consignments of goods for defendant, said goods to be sold for account of defendant, and plaintiff to be paid a commission of 5 per cent on all sales made. (Exhibit C, p. 73.)

This controversy arises out of the alleged violation of the terms of the foregoing contracts. Plaintiff in his petition alleged that he carried out all the provisions of his agreement with the defendant, but that defendant in violation of his agreement entered into competition with him and damaged him in the sum of 25,000 taels; that he has made a proper accounting to defendant, but that defendant has refused to render him an account or make a settlement with him. Plaintiff also claims to have advanced the defendant 2,700 taels, which is alleged to be yet due him.

Defendant's answer traverses the allegations of plaintiff's petition, and sets up two counterclaims, the first growing out of a breach by the plaintiff of the contract of the 4th day of October, 1905, and the second growing out of plaintiff's breach of the contract of the 21st day of December, 1905.

Defendant further alleges that under said contract of the 4th day of October, 1905, he delivered to plaintiff a complete line of samples of the goods to be sold, valued at $200 gold, which the plaintiff failed to return, but sold and appropriated the proceeds of same to his own use; that plaintiff failed to carry out the provisions of said contract by having failed to sell during the first year thereof 15,000 barrels of Pabst beer, 15,000 cases of St. Charles evaporated cream, and the stipulated amount of the other products covered by the agreement; that the defendant by virtue of such failure was damaged in the sum of $17,475.50 gold by loss of profits and value of samples; that the brands of Pabst beer and St. Charles evaporated cream have been damaged by the failure of plaintiff to bring them properly before the trade and that to rehabilitate the business of Pabst beer and St. Charles evaporated cream will necessitate the expenditure of $7,500 gold and $2,500 gold respectively. Under his first counterclaim the defendant prayed for judgment in the sum of $27,475.50 gold.

For a further counterclaim the defendant sets out the contract of the 21st day of December, 1905, above mentioned, and alleges that pursuant to the terms thereof the defendant delivered at Vladivostok a large amount of goods and merchandise, a part of which plaintiff sold and accounted for on the 18th day of January, 1906, but, after said accounting, there remained in possession of plaintiff certain goods which were unsold; that later defendant demanded from plaintiff the redelivery of said unsold goods, and that on or about the 9th day of April, 1906, plaintiff shipped to Shanghai a part of said goods, consisting of 4,800 cases of Armour's beef, 1,852 cases of Armour's beef, and 260 cases of blue mottled soap; that plaintiff failed to notify defendant that said goods were shipped, wrongfully shipped them in his own name, and wrongfully hypothecated to the Russo-Chinese Bank the bills of lading covering the shipment of said goods; that in consequence of said wrongful shipment and hypothecation, the defendant was damaged in the sum of $2,249.60 gold, which sum was paid in compliance with the award of the honorable Sir Havilland de Sausmarez, chief justice of His Britannic Majesty's supreme court for China and Korea, acting as sole arbitrator; that besides the goods so shipped, other goods unaccounted for remained in the possession of the plaintiff; that the value of the goods other than the Pabst beer unaccounted for is $7,027.74 gold; that the damage which resulted to defendant from the failure of plaintiff to account for 546 barrels of Pabst beer, which were delivered under said contract is $9,244.66 gold, which said amount was paid in compliance with the above-mentioned arbitrator's award, and that by reason of the default and failure of plaintiff to fulfill his contract, and as a result of the wrongful shipment of said goods to Shanghai, the defendant has been put to the necessity of paying for legal service the sum of $1,140 gold and that by reason of the wrongful shipment of said goods to Shanghai the defendant has been required to pay $351.88 gold for storage of said goods.

Upon the second counterclaim the defendant prayed judgment in the sum of $20,014.08 gold.

Plaintiff was represented at the trial by Mr. N. C. Home. Plaintiff himself did not appear, but left China before the case came on for trial. His attorney appeared and asked for a continuance by reason

of his absence. After hearing argument upon said motion for continuance, the court ruled that, in view of the fact that defendant's agent had come to Shanghai under great expense for the sole purpose of attending the trial of this case and giving testimony therein, the testimony of the defendant would be taken at this time, and that a commission for taking the testimony of the plaintiff, who was then in the United States, would issue upon the completion of the taking of defendant's testimony. A transcript was made of same, and copies furnished to the counsel for both plaintiff and defendant. A copy of the said transcript also accompanied the commission to take depositions in the United States. The plaintiff was notified by cable of the foregoing facts, which notification duly reached plaintiff as shown by later cable received by the court from him. Plaintiff did not avail himself of the opportunity to give his testimony in this case before the commissioner appointed by the court, but left the United States for Europe before the date set for the taking of his testimony. The court stated at the trial that it had in person informed Friede in Yokohama in July, 1906, that his case against Getz Brothers would be heard in the following November or December. It thus appears that Friede left the Orient, knowing when his case would be called for trial and left the United States on the 4th day of February, 1907, after having been duly informed a month in advance that a commission had been issued to enable him to give his testimony in the case in St. Louis, Mo., on the 1st day of March, 1907.

The evidence in this case is limited to the testimony of witnesses, L. R. Tuttle, J. H. Monson, and H. Dannenberg, and the documents introduced as exhibits. The testimony shows that defendant complied with the terms of the contract of the 4th day of October, 1905; that it furnished plaintiff with a line of samples valued at $200 gold, which the plaintiff failed to return and account for (see record, pp. 14 and 15); that plaintiff neglected the business and failed to communicate with defendant in regard to it and answer inquiries made by defendant.

The testimony further shows that under the terms of the contract the plaintiff agreed to sell annually 15,000 barrels of Pabst beer and 15,000 cases of St. Charles evaporated cream, but that, instead of selling the stipulated amounts, he only placed an order for 2,800 cases of St. Charles evaporated cream, and no order for Pabst beer, but that he failed to account for 800 cases St. Charles evaporated cream, and that defendant sold for Mr. Friede's account 250 barrels of Pabst beer. The testimony also shows that plaintiff did not send any orders for Armour's beef and other lines of goods covered by said contract of the 4th day of October, 1905, and that it was agreed that Pabst beer was to have been sold at a profit of $2 gold per barrel, and that the amount of profit on St. Charles evaporated cream was to have been 45½ cents per case. The profit on 14,750 barrels of Pabst beer at $2 gold per barrel would have been $29,500 gold; the half profit on 250 barrels sold was $250 gold, which amount deducted from the half-profit on the 14,750 barrels of Pabst beer, which were unsold, would leave an amount due to defendant of $14,500 gold. Plaintiff sold 2,800 cases St. Charles evaporated cream, whilst his contract called for 15,000 cases, leaving a difference between the amount actually ordered and that called for by the contract of 12,200

cases. Had the sales of St. Charles evaporated cream according to the contract been made there would have been a profit to defendant of $2,775.50 gold. Mr. Tuttle testified that in order to rehabilitate the business on Pabst beer and St. Charles evaporated cream in Manchuria it would necessitate the expenditure by defendant of $10,000 gold.

The evidence in the second counterclaim is as follows:

A statement of the bill covering the goods delivered to plaintiff under the second contract is found in Exhibit C. Exhibit I shows the value of said goods. A part of those goods were sold and accounted for by plaintiff and the profits divided. (See record, p. 25.) A part of these goods, however, plaintiff failed to account for, the value of which, exclusive of the 546 barrels of Pabst beer which defendant had to pay for under the arbitration award and exclusive of the beef and soap which were shipped to Shanghai, was $7,027.74 gold. (See record, pp. 26, 27, and Exhibit I.) A part of the goods covered by the contract of the 21st day of December, 1905, were shipped to Shanghai.

Upon the 29th day of March, 1906, the defendant sent to the plaintiff a cable instructing him to ship the unsold goods to Shanghai. (See Exhibit I.) Thereafter the plaintiff shipped to Shanghai 4,800 cases of Armour's beef, 1,852 cases of Armour's beef, and 260 cases of blue mottled soap. Instead, however, of consigning these goods to the defendant, the plaintiff wrongfully consigned the goods to himself at Shanghai, and thereafter hypothecated the bills of lading of said shipment to the Russo-Chinese Bank. On or about the 9th day of April the said shipment arrived in Shanghai, but no advice of same was received by the defendant; in fact, no communication whatever on the subject was sent to the defendant by Mr. Friede. It was some days later, according to the evidence of Mr. Tuttle, that the defendant learned that the cargo was in Shanghai. The carriers were the Chinese Eastern Railway Company. Application was made to them for delivery, and they demanded a bond from the defendant in lieu of the bills of lading. Later the Russo-Chinese Bank informed the defendant that it had a claim of $11,932.45 gold, plus the charges, against this particular shipment, and held the bills of lading therefor. This was the first intimation the defendant had received of any claim against the cargo. Upon inquiry it was learned from the bank that the bills of lading had been indorsed to them by M. S. Friede and that Friede had instructed the branch of the bank at Vladivostok to collect this amount and place it to his credit. This is confirmed by the testimony of Mr. Munson. (See record, p. 62.)

As a result of these transactions on the part of Friede, the defendant was sued by Mr. Bertram, who was the owner of 1,852 cases of the above beef, which had been turned over to Getz Brothers to sell for him, as were the 546 barrels of Pabst beer. A controversy arose between the parties interested, and it was agreed that the dispute arising out of the whole transaction should be arbitrated. Sir Havilland de Sausmarez, presiding judge of His Britannic Majesty's supreme court, was chosen sole arbitrator. Under the award of the arbitrator (see Exhibit P), the defendant was required to pay a sum of $2,249.60 gold to Mr. Bertram. This loss flowed directly from the wrongful shipment to Shanghai by plaintiff of the goods above mentioned, and in addition to this amount the defendant was required to

pay under the said arbitration for the 546 barrels of Pabst beer which were consigned to the plaintiff under the contract of the 21st day of December, 1905, and which the plaintiff failed to return or account for the sum of $9,244.86 gold.

The defendant was required by reason of the default and failure of the plaintiff to fulfill his contract of the 21st day of December, 1905, and by the wrongful shipment of the goods to Shanghai, and by reason of the wrongful hypothecation of the said bills of lading to defend suits which were instituted against him, and to pay for legal services in connection therewith, the sum of $1,140 gold (see Exhibits M and O), and by reason of the wrongful shipment of the goods from Vladivostok to Shanghai and the failure to notify defendant of said shipment defendant was required to pay the sum of $351.88 gold for storage of the said goods at Shanghai, which said storage would not have been incurred had the goods been shipped in accordance with defendant's orders and the defendant properly notified of the same. (See Exhibit M.) The defendant, therefore, by reason of the failure of Mr. Friede to comply with the conditions of the contract of the 21st day of December, 1905, and by reason of his wrongful actions thereunder has been damaged as follows:

	Gold.
For goods consigned which have not been accounted for, with the exception of 546 barrels of Pabst beer	$7,027.74
By failure of the plaintiff to account for the delivery of Pabst beer	9,244.86
By reason of the wrongful shipment and hypothecation of 1.852 cases of Armour's beef	2,249.60
By reason of the legal actions which arose out of Friede's dereliction	1,140.00
By reason of storage on said goods wrongfully shipped and failure to notify defendant of said shipment	351.88
Making a total of	20,014.08

The amount of the two counter-claims aggregates $47,489.58 gold.

Tuttle testified that defendant stood ready at all times to perform his obligations under the contract, and that he did not enter into competition with plaintiff in Manchuria or Siberia. This testimony stands uncontradicted.

In view of the foregoing evidence, the petition of plaintiff must be denied, and the claim of defendant, less $10,000 gold, the amount claimed for the rehabilitation of the brands of Pabst beer and St. Charles evaporated cream, which is merely speculative, must be admitted. Judgment is therefore rendered in favor of Getz Brothers & Co., defendant herein, in the sum of $37,489.58 gold and the costs in this case.

(Signed) L. R. WILFLEY,
Judge of the United States Court for China.

SHANGHAI, CHINA, *July 5, 1907.*

United States court for China.

Chen Wong Tai v. A. W. George & Co.

JUDGMENT.

The evidence in this case established the following facts: On the 9th day of July, 1905, E. de Bavier, on behalf of the Shanghai Tannery Company, entered into a contract with A. W. George and Francis

Stanley, partners, doing business under the firm name of A. W. George & Co., the defendants herein, for the construction of certain buildings on a piece of land located on Soochow Creek, in the city of Shanghai, China. The contract provided that the buildings should be finished and ready for occupancy within four months from the date defendants were allowed to begin work by Bavier, and that defendants should be paid therefor the sum of 23,200 Shanghai taels; said sum to be paid in installments. The contract provided that the first of these installments should be 7,200 taels, which should be paid "when the foundations of all the buildings are completed and walls thereof are one foot above the ground." (See defendants' Exhibit A.)

On the 8th day of July, 1906, said defendants entered into a contract with plaintiff for the construction of the buildings referred to in the above-mentioned contract between Bavier and said defendants, whereby plaintiff agreed to construct said buildings in accordance with the plans and specifications for the sum of 21,000 taels. It was further agreed that the buildings should be completed by the 15th day of December, 1906. The contract also provided that the plaintiff should be permitted to commence work on or before the 15th day of July, 1906, and that he should be paid in installments, the first and second of which were as follows:

First. Cement and wall 1 foot above floor, 5,000 taels.
Second. First floor, 5,000 taels.

This contract was also signed by one W. H. Tseen, as guarantor for Chen Wong Tai. (See defendants' Exhibit E.)

Pursuant to this agreement plaintiff undertook the construction of said buildings, beginning the work thereon about the middle of July, 1906, and prosecuted the same until about the 14th day of September of the same year, when, according to his statement, he was forced to cease operations by failure of defendants to make payments in accordance with the terms of the agreement. On or about the 18th day of August, 1906, plaintiff made demand upon defendants for the first installment called for by the contract. On the 21st day of August defendants paid W. H. Tseen, without authority from plaintiff, 3,000 taels. (See defendants' Exhibit G.)

Prior to the 18th day of August, 1906, defendants had been paid by Bavier the first installment of 7,200 taels in accordance with the terms of their agreement. Of the 3,000 taels paid to Tseen, 1,000 taels were paid to Chen Wong Tai. It appears that Tseen absconded with the other 2,000 taels and has not been heard of since, notwithstanding the fact that this court has exhausted all means at its command to locate him.

When Chen Wong Tai was forced to cease work on the buildings, he left a quantity of building material on the building site, which defendants prohibited him from removing.

Thereafter, on the 3d day of October, 1906, defendants entered into a contract with one Chu Kun Kee for the completion of the buildings in question, agreeing to pay therefor the sum of 16,500 taels. Among other things said contract provided as follows:

That all material such as bricks, wood, cement, concrete, lime, Foochow poles, and lumber, are turned over to the new contractor; when all work is completed he shall take away all material on the premises. (See defendants' Exhibit E.)

Basing his claim on the foregoing facts, the plaintiff brings this suit against defendants for the 4,000 taels due on the first installment,

and for 8,579 taels representing the value of the work claimed to have been done on the second installment, and the value of the material which was deposited on the building site which was not used on the building and which was retained by the defendants, and for loss of profit flowing from defendants' breach of the contract in the sum of 1,000 taels.

It now becomes necessary to examine the evidence in this case for the purpose of fixing the responsibility for the breach of the contract and of determining the actual value of the material furnished and work done by plaintiff pursuant to the terms of his agreement. There is no doubt that plaintiff was forced to quit work on the building by reason of defendants' failure to pay him according to the terms of the agreement. The evidence shows that plaintiff had worked for a period of two months on the buildings, and that large amounts of material had been furnished by him. Merchants from whom plaintiff had purchased material, and plaintiff himself, testified that large amounts of material had been delivered and deposited upon the building site, part of which had been put into the building, and part of which remained unused at the time the plaintiff was forced to quit work. The value of this material is variously estimated at from 9,000 taels to 12,000 taels.

It is not contended by defendants that more than 3,000 taels was ever paid to plaintiff or his representative. The evidence shows that of the 3,000 taels paid to Tseen only 1,000 taels ever reached Chen Wong Tai. Notwithstanding that these facts were brought to the notice of defendants, they failed and refused to make any further payments, with the natural result that plaintiff was forced to suspend operations.

That plaintiff had finished the work called for by the contract, which entitled him to the first installment of 5,000 taels, is conclusively proved by the letter of defendants' which was written in response to plaintiff's demand for payment of said installment, and which is as follows:

AUGUST 18, 1906.

CHEN WONG TAI.

DEAR SIR: We wrote to let you know that the money for the first installment is here ready for you. Please call and receive the same.

We remain, yours truly,

(Signed) W. A. GEORGE & CO.

(See defendants' Exhibit I.)

Prior to this date the defendants had received from Bavier the first installment under their contract with him, which amounted to 7,200 taels. (See testimony, p. 48.) The fact that this payment was made not only corroborates the proof that the work under the first installment had been completed, but goes to show that plaintiff had done more work than was called for under the first installment before demand was made for the payment of the 5,000 taels, for the reason that Bavier would not have paid defendants 7,200 taels under their contract with him unless the work had been finished according to the terms of the contract. On this point Mr. Robert J. Carter, defendants' witness, who was agent for Bavier in this transaction, testified as follows:

My instructions from the company were that Messrs. George & Co. could never draw one copper cash from us unless they received a note from me stating that the work had been completed at such and such a stage. When they got the foundations com-

pleted and 5 feet up they were entitled to the first payment. I must say that they did get up 5 feet, but they never went any farther for a long time, and I have the date when they stopped work. The date when they stopped work was the 14th day of September last year. (See testimony, p. 41.)

This testimony is conclusive upon the point that defendants had complied strictly with their contract with Bavier and had performed work satisfactory to the latter, which entitled them to their first installment of 7,200 taels. The contract with Bavier provided that when the foundations of all the buildings were completed and walls thereof were 1 foot above the ground the first installment would be due. It thus appears that plaintiff had done a sufficient amount of work on the building to entitle defendants to collect 7,200 taels, and that defendants had in turn only attempted to pay him the sum of 3,000 taels. Thereafter plaintiff continued work for a period of about thirty days, during which time it is fair to assume that substantial additions were made to the buildings.

According to the testimony of the plaintiff, almost a sufficient amount of work had been done to entitle him to the payment of the second installment under the contract. On this point his testimony is as follows:

I had already put sleepers in the upper story. I had done enough for practically the second installment. The second installment was due when the building was far enough advanced to put up the sleepers, and I had reached that period. There were two smaller buildings and one large one. The larger one had to be raised to the height of the sleepers in the upper stories. The concrete and foundations were all finished for the three buildings, and the larger building had been erected high enough to put the sleepers in. I had done enough work for the second installment, but they would not pay me. (See testimony, p. 11.)

This testimony was contradicted by Messrs. Stanley and Carter, both of whom, however, admitted that the concrete and foundations for all the buildings were in and that the walls of the main building were 5 feet high.

In view of the foregoing facts, namely, that defendants had acknowledged plaintiff's right to the first installment of 5,000 taels, that plaintiff had done sufficient work to entitle defendants to receive their installment of 7,200 taels from the owner, and that therefore the plaintiff had worked on the building for a period of thirty days, and in view of plaintiff's testimony, the court feels warranted in holding that on the date plaintiff was compelled to quit work he had furnished materials and performed labor on the buildings in question, the value of which may fairly and reasonably be estimated at 8,000 taels.

On the question of the value of the material left deposited on the ground which was not used in the construction of the buildings there is much conflict of testimony. Plaintiff introduced a number of witnesses who were familiar with the quantity and value of said material and who testified with reference to the same with considerable certainty. All of these witnesses agreed that the value of said material was about 5,000 taels.

Chang Kuei Yuen, plaintiff's foreman, testified that said material consisted of broken bricks used for making concrete, lime, red and black bricks, Foochow poles, Japanese wood, timber, roofing cement, roofing felt, corrugated iron, and a number of carpenters' sheds, all of which he valued at 6,510 taels.

Plaintiff also produced a number of Chinese merchants, who testified that they had furnished large quantities of material to the plaintiff for use in the construction of the building in question, large parts of which remained on the ground to their personal knowledge after the plaintiff had stopped work.

The defendants' witness, William James Keeling, a carpenter by trade, who was for a time in charge of the premises as watchman, testified that he made a list of the material left on the ground, which list corresponded in the main with the list furnished by plaintiff's witnesses, except as to quantity. He did not undertake to estimate the value of this material.

Mr. Stanley testified that the value of said material was small.

The court is of the opinion that the estimate placed upon the value of said material by plaintiff's witnesses is somewhat too high and that of defendants' witnesses considerably too low, and believes that value of said material should be estimated at 3,000 taels.

In addition to the foregoing the plaintiff claims damages for loss of profit in the sum of 1,000 taels, which, in view of all the circumstances, is not, in the opinion of the court, an unreasonable demand.

This leaves but one question to be decided, namely, whether the payment of the 3,000 taels to Tseen was a legal payment which should be credited on plaintiff's first installment. Tseen was plaintiff's guarantor, and the evidence shows that he had collected a small sum from the defendants prior to the date he received the 3,000 taels above mentioned. On the other hand, defendants admit that they had received no order from the plaintiff, either written or oral, authorizing them to take payment of any amount to Tseen. It thus appears that the defendants made this payment to Tseen without legal authority, and in the absence of proof of the existence of a local custom warranting such a course it must be held that payment was made at defendants' risk. Defendants are therefore credited on the first installment with the payment of 1,000 taels only, the amount which plaintiff actually received.

In view of the foregoing considerations the court finds:

1. That plaintiff's failure to finish the construction of the buildings covered by the contract was due solely to defendants' failure to pay the installments as they fell due under the contract.

2. That the value of the labor performed and the materials which entered the buildings is 8,000 taels.

3. That the value of the unused material plaintiff left on the ground which defendants prohibited him from removing, and which defendants afterwards, without right or authority, transferred to Chu Kun Kee, is 3,000 taels.

4. That by reason of defendants' breach of contract plaintiff has been damaged by loss of profit in the sum of 1,000 taels.

5. That defendants have paid plaintiff the sum of 1,000 taels.

Judgment is therefore rendered in favor of the plaintiff in the sum of 11,000 taels and for the costs of this suit.

L. R. WILFLEY,
Judge of the United States Court for China.

SHANGHAI, *July 17, 1907.*

United States court for China.

Chu Kun Kee v. A. W. George and F. S. Stanley, partners, doing business as A. W. George & Co.

JUDGMENT.

On the 3d day of October, 1906, plaintiff, Chu Kun Kee, entered into a contract with defendants' firm, A. W. George & Co., whereby he agreed to complete the erection of certain buildings situated on Soochow Creek, in the city of Shanghai, the construction of which had been begun by subcontractor Chen Wong Tai during the month of July preceding. The contract price was 16,500 taels, which was to be paid in installments, the last of which, 5,000 taels, was to be paid after the building was completed. Pursuant to the provisions of this contract, plaintiff entered upon the work and completed the building in accordance with the terms of the contract on the 9th day of February, 1907. The buildings were then turned over to defendants who, in turn, delivered them to Bavier & Co., who accepted them after a few alterations were made, which cost 204.96 taels.

According to the terms of the agreement between A. W. George & Co. and Bavier & Co., the contract price for the construction of the building was to be paid in installments, the last of which was 5,000 taels. This last installment, less 204.96 taels, was paid some days prior to the 17th day of April, 1907. On the 18th day of April, 1907, plaintiff went to the office of defendants and demanded payment of the last installment due him under his contract. Before any money was paid defendants handed him a receipt for 5,000 taels, which he signed without hesitation. The receipt was drawn by defendant, Stanley, on a letter head of A. W. George & Co., and reads as follows:

SHANGHAI, *April 19, 1907.*

Received from A. W. George & Co. the sum of 5,000 taels, the balance due on Shanghai Tannery Company building.

Received payment, with thanks, less 204.96 taels (two hundred and four taels and ninety-six cents).

(Signed) CHU KUN KEE (CHOP).

(Defendants' Exhibit B.)

The foregoing facts are undisputed. The dispute which is the basis of this suit arose out of the transaction which took place in defendants' office in connection with the payment of the last installment after the above-mentioned receipt was signed.

Plaintiff's story is that defendants, after they got possession of the signed receipt, paid him, not the 5,000 taels due him under his contract, but 3,398.70 taels. Defendants deny this statement and claim that the full amount of the last installment, namely, 5,000 taels, was paid, less 204.96 taels.

It now becomes necessary to examine the testimony adduced at the trial and to consider the facts and circumstances surrounding this case with a view to ascertaining the truth.

Plaintiff testifies that he took with him to the office of defendants two friends, one of whom was the compradore of M. Marti & Co., neither of whom were permitted by defendants to enter the office. He

then stated that he entered the office alone and signed the receipt at the request of defendants, but that when they paid over the money they "cut" him 1,601.30 taels. He said they explained to him that a deduction had been made because Bavier had "cut" them by reason of the defects in the building and that they had been put to the necessity of paying lawyers, arbitrators, etc. He stated that he remonstrated and quarreled with defendants for a period of about two hours and was then ordered out of the building, and that a municipal Sikh policeman was sent for by George for the purpose of ejecting him if he refused to go. He further stated that he went immediately from the office of A. W. George & Co. to the office of Bavier & Co., where he met Mr. L. D. Lemaire, the secretary of the company, and Wa Ka Lee, a clerk in the office of the company, and told them of the treatment he had received at the hands of the defendants. He also testified that the money was not paid in a lump sum, but in native compradore orders and cash, the total amount of which was 3,398.70 taels. (Plaintiff's Exhibit B.)

Plaintiff's story is corroborated by the testimony of his own friends and of the employees of Bavier & Co. and by the testimony of the assistant cashier of the Russo-Chinese Bank. The two friends who accompanied him to defendants' office testified that they were not permitted to enter the office, but remained outside the hall and that, while waiting for plaintiff, they heard a commotion on the inside consisting of loud talking and quarreling, which kept up for a period of nearly two hours, at the conclusion of which George ordered a policeman for the purpose of ejecting the plaintiff from the room. They also testified that as soon as plaintiff left the office he told them that the quarreling was occasioned by the fact that George "cut" him in his last settlement in the sum of about 1,700 taels.

Mr. L. Dire, secretary of Bavier & C. Lemao., and Wa Ka Lee, a clerk in the office of the same company, testified that on the 18th day of April, 1907, plaintiff came to the office of the company and complained that he had been "cut" by defendants in his final settlement with them about 1,700 taels, and gave them an account of what had transpired in defendants' office when the settlement was made. Mr. Lemaire further testified that this was not the first time that plaintiff had come to him and made complaint about the manner in which defendants did business. He stated that plaintiff had often complained that he had difficulty in getting defendants to make payment according to the terms of the contract.

Wa Ka Lee testified that at the time plaintiff made this complaint to him in the office of Bavier & Co. he, Wa Ka Lee, wrote out the amount which plaintiff stated defendants had paid him. (Plaintiff's Exhibit B.) The slip on which the memorandum was made was identified by witness and by Mr. Lemaire at the trial.

Mr. M. E. Bastien, assistant cashier of the Russo-Chinese Bank, testified that the Bavier check to George & Co. for 5,795 taels was cashed on the 17th day of April, 1907, and that George obtained payment in three compradore orders, one for 1,000 taels, one for 1,200 taels, one for 595.04 taels, and the remaining 2,000 taels in bank notes.

Defendants' story of the transaction consisted of a simple denial of the facts alleged by plaintiff, supplemented by the claim that

the full amount of the last installment of the contract was paid, less 204.96 taels, the amount deducted by Bavier & Co. on account of the defects in the building. On cross-examination defendant George was asked where he got the funds out of which he made the payment of the last installment to plaintiff. His answer was that he did not know, but that he was certain it did not come from the proceeds of the check from Bavier & Co., because that check was not cashed until the 19th day of April. When he had heard the testimony of Mr. Bastien, assistant cashier of the Russo-Chinese Bank, as to the exact date on which the Bavier check was cashed by his firm, he went on the witness stand and testified that he had made a mistake; that the check was cashed on the 17th day of April, 1907, and that the plaintiff was paid from the proceeds of same. When asked why he did not indorse the Bavier check over to plaintiff, he was at first unable to make any explanation. Subsequently he undertook to account for this transaction by saying that he wanted to get some cash for the purpose of protecting his friend Heath, from whom plaintiff had purchased material, and who did not trust plaintiff, the idea being that Heath should be paid in cash at the time of the settlement between defendants and plaintiff. This testimony, however, was not corroborated; on the contrary, the evidence showed that Heath was not paid in cash, but with one of the native compradore orders which plaintiff had received from defendants. Defendant George was unable to give any satisfactory reason for the unusual manner in which the final payment to plaintiff was made.

Defendant Stanley testified that the financial end of the firm was managed exclusively by his partner, George.

Defendants' manner on the stand and method of doing business impressed the court quite as much as their testimony. They both testified that they had been in partnership for a period of one year and three months; that prior to that time defendant Stanley was a seaman and a wharfinger, and that until within the last few years the defendant George was a carpenter and foreman. George, though claiming to have been an architect for thirty-five years, had never practiced his profession until within the last few years, and then only in Shanghai. Both defendants testified that the firm had no capital stock to begin with, that it is now without capital, and that it had never kept books of any description or character and had never had a bank account. They stated they kept no records whatever of their business transactions, and that whenever money was paid into the firm it was divided between them immediately. The testimony of the defendant George was incoherent and contradictory and his manner on the stand embarrassed and confused.

On the other hand, plaintiff's story is straightforward and reasonable, and is supported by the testimony of creditable witnesses and by the probabilities of the case. It is a well-known fact that Chinese merchants and business men are usually honest and trustworthy and faithful in the performance of their obligations under their contracts. It is also well known that they are disposed to be reasonable and conciliatory in all their business transactions, especially with foreigners, and are not given to quarreling except under circumstances of great provocation. This being so, it is highly improbable that plaintiff would have raised an outcry and gone to the expense and trouble of bringing this suit had there been no foundation for his claim.

On the whole, plaintiff's general appearance and the nature and character of the testimony produced by himself and on his behalf during the trial impressed the court that the claim is a bona fide one, and that plaintiff's statements made in court in this case are probably true. On the other hand, the court regrets to state that defendants' testimony and general conduct in the trial of this case and their methods of doing business as disclosed by their own statements are not such as to inspire the court with confidence in their integrity. In view of these facts, the testimony of defendants in this case must be rejected, and that of plaintiff and his witnesses accepted as true.

The court is of the opinion that in their final settlement with plaintiff defendants wrongfully and fraudulently withheld from him the sum of 1,601.30 taels due him under his contract.

Judgment is therefore given in favor of the plaintiff in the sum of 1,601.30 taels, and for the costs in this case.

L. R. WILFLEY,
Judge of the United States Court for China.

SHANGHAI, July 17, 1907.

In the United States Court for China at Shanghai, August, 1907.

F. M. Brooks, plaintiff, v. P. W. Irvine, C. W. Mead, and The International Banking Corporation, defendants.

JUDGMENT.

This case came on for trial on the 8th day of August, 1907. The testimony produced at the trial established the following facts: On or about the 29th day of July, 1905, defendant, C. W. Mead, borrowed from plaintiff, F. M. Brooks, the sum of $2,750 Mexican, and executed a promissory note to said plaintiff which recited that the same was for value received and that the sum would be returned within sixty days. The note bears date July 29, 1905. (Plaintiff's Exhibit A.) The amount of the note was not paid within the sixty days specified therein. On October 31, 1906, said defendant, Mead, gave an order on the International Banking Corporation at Shanghai in which he directed said banking corporation to "pay to the order of Francis M. Brooks the sum of $3,025 as soon as the money you have of mine is released from the Standard Oil Company bond." (Plaintiff's Exhibit C.) Plaintiff testified that he received this order in due course, and immediately upon the receipt of same he presented it to said International Banking Corporation at Shanghai. On or about the 31st day of December, 1906, the manager of said banking corporation informed plaintiff that the money referred to in the order of the defendant, Mead, was not available. (Defendant's Exhibit A.) It appears that the International Banking Corporation had become surety for Mead on a certain bond which the latter had executed to the Standard Oil Company of New York, and in order to protect said banking corporation against any loss which might result by reason of this transaction Mead had agreed that said bank should hold a certain fund which he had deposited with said bank. The testimony showed that at the date of filing this suit the Standard Oil Company bond had been canceled and the claim of said International Banking Corporation to the special fund above referred to

relinquished. The testimony also showed that upon the application of defendant, Irvine, an alleged creditor of Mead, the United States court for China issued an attachment against the funds of Mead in the hands of said International Banking Corporation, and as a result thereof all of the moneys which Mead had on deposit in said bank were transferred to the account of the marshal of the United States court for China.

In view of the foregoing facts, namely, that said C. W. Mead was indebted to the plaintiff in the amount claimed in the petition and that he had given an order to the plaintiff on the International Banking Corporation for the payment of the same out of a special fund belonging to said Mead held by said banking corporation, the court finds that said order created an equitable lien upon said special fund.

It is therefore ordered—

First. That the attachment issued by the court upon the application of P. W. Irvine be dismissed.

Second. That the marshal of this court transfer said funds which have been deposited in his name as marshal of said court as a result of the above-mentioned attachment to the International Banking Corporation; and

Third. That said International Banking Corporation pay to plaintiff the sum of $3,025 Mexican.

It is further ordered that defendant, P. W. Irvine, pay the costs of the suit.

(Signed) L. R. WILFLEY,
Judge of the United States Court for China.

SHANGHAI, *August 16, 1907.*

In the United States Court for China at Shanghai, August, 1907.

Albert W. Cunningham, administrator of the estate of Henry H. Cunningham, plaintiff, v. James Linn Rodgers, consul-general of the United States at Shanghai, China, defendant.

JUDGMENT OF THE COURT

sustaining the plea in abatement, and holding that—

China, in so far as the administration of estates of Americans decedent therein is concerned, is a separate, distinct, and complete jurisdiction, similar to that of one of the unorganized Territories of the United States; and that

It is a well-settled principle of American law that no suit can be maintained by an administrator or executor of an estate appointed by the courts of one jurisdiction, in his capacity as such, except within the limits of the jurisdiction from which he derives his authority.

The question raised by the plea in abatement filed herein is whether an administrator appointed in the State of Maine can, in his capacity as such, prosecute a suit in the extraterritorial jurisdiction of China.

The pleadings in this case disclose the following facts: On the 10th day of June, 1905, Henry H. Cunningham, an American citizen, died at Shanghai, China, leaving a will in which Edward H. Dunning was named as executor. On June 26, 1905, Edward H. Dunning presented said will to the United States consular court at Shanghai for probate. Consul-General James Linn Rodgers, sitting as judge, admitted the will to probate and confirmed said Edward H. Dunning

as executor. The estate was then administered by said executor under the direction of said consular court, in accordance with the provisions of the last will and testament of the testator. On the 17th day of May, 1907, Albert W. Cunningham, administrator of the estate of Henry H. Cunningham for the State of Maine, filed suit against James Linn Rodgers, consul-general of the United States at Shanghai, China, charging him with negligence and misconduct in office in this, that said James Linn Rodgers administered the estate of said Henry H. Cunningham in his judicial capacity, and not in his capacity as consul-general, in accordance with the provisions of sections 1709, 1710, and 1711 of the Revised Statutes of the United States, and asked for a judgment against said James Linn Rodgers in the sum of $58,165.85.

In abatement of this suit defendant files a plea in which he contends that said plaintiff, Albert W. Cunningham, being the administrator of the estate of Henry H. Cunningham in the State of Maine only, is without right or authority in his capacity as such administrator to prosecute a suit of any character in the extraterritorial jurisdiction of China.

It is manifest from the facts recited in the petition that Consul-General Rodgers entertained the view that he, as judge of the United States consular court sitting in Shanghai, had jurisdiction under the common law to probate wills and administer the estates of Americans decedent in China, and that he was of the opinion that Henry H. Cunningham was a citizen of the United States domiciled in China. He therefore took jurisdiction, admitted the will to probate, and directed the administration of the same in accordance with the law in force in China, which is the common law.

This court has held (in re probate of will of John P. Roberts, May 15, 1907) that the United States court for China has jurisdiction to probate wills and administer estates of Americans decedent in China in accordance with the provisions of the common law, and that prior to the inauguration of this court the American consular courts in China were clothed with the same jurisdiction. This court also held (In re probate of will of Young John Allen, August 16, 1907) that an American citizen may be domiciled in China.

The significance of the foregoing decisions is that the court holds the view that under the treaties of extraterritoriality in force between the United States and China and the acts of Congress passed pursuant thereto, and for the purpose of carrying the same into full force and effect, China, in so far as the administration of the estates of Americans decedent therein is concerned, is a separate, distinct, and complete jurisdiction, similar to that of an unorganized Territory belonging to the United States.

In the United States the law on the question raised by the defendant's plea in abatement is clear. The authorities all hold that the right of an administrator of an estate does not go beyond the limits of the State in which he is appointed. In the case of Johnson *v.* Powers (139 U. S., 157), the court ruled as follows:

> The plaintiff certainly can not maintain this bill as administrator of Stewart, even if the bill can be construed as framed in that aspect, because he admits that he has never taken out letters of administration in New York, and the letters of administration granted to him in Michigan confer no power beyond the limits of that State, and can not authorize him to maintain any suit in the courts, either State or national, held in any other State.

In Noonan *v.* Bradley the Supreme Court of the United States used the following language:

> The first plea puts in issue the representative character of the plaintiff in the State of Wisconsin. It denies that, as to the cause of action stated in the declaration, he is or ever has been administrator of the effects of the deceased, and thus raises the question whether an administrator, appointed in one State, can, by virtue of such appointment, maintain an action in another State to enforce an obligation due his intestate. And upon this subject the law is well settled. All the cases on the subject are in one way. In the absence of any statute giving effect to the foreign appointment, all the authorities deny any efficacy to the appointment outside of the territorial jurisdiction of the State within which it was granted. All hold that in the absence of such a statute no suit can be maintained by an administrator in his official capacity, except within the limits of the State from which he derives his authority. If he desires to prosecute a suit in another State, he must first obtain a grant of administration therein in accordance with its laws. (9 Wall., 399.)

In view, therefore, first, of the holding of this court that the extraterritorial jurisdiction of China is separate, distinct, and complete, in which Americans may become domiciled and in which the estates of Americans may be administered by duly constituted courts in accordance with the provisions of the common law; and in view, second, of the above-mentioned decisions of the United States courts that in the absence of statutes giving effect to a foreign appointment no suit can be maintained by an administrator or executor in his official capacity except within the limits of the State from which he derives his authority, we hold that Albert W. Cunningham, as administrator of the estate of Henry H. Cunningham, appointed by the courts of the State of Maine, is without authority to prosecute this suit.

The plea in abatement is sustained.

(Signed) L. R. Wilfley,
Judge of the United States Court for China.

Shanghai, *August 19, 1907.*

In the United States court for China, at Shanghai, August, 1907.

Re George F. Curtis and H. A. C. Emery, respondents for contempt of court.

JUDGMENT.

Respondent, H. A. C. Emery, is here charged with contempt of court in this, that he disregarded and disobeyed an order of this court directing him to appear before it and give an account of his administration of his father's estate, of which he was executor.

Respondent, George F. Curtis, is here charged with contempt of court in this, that after having knowledge of the rule of the court relating to the admission of attorneys to its bar, and after failing and refusing to comply with the requirements of said rule, though given opportunity so to do, he, in violation of said rule, appeared in court as counsel for respondent Emery in the matter of the settlement of his father's estate.

The record in this case discloses the following facts: On the 24th day of July, 1907, this court issued a citation to respondent, H. A. C. Emery, a resident of Chefoo, directing him to appear before this court on Monday, the 12th day of August, 1907, for the purpose of producing all of the documents and other evidence requisite for show-

ing and proving his acts as executor of the will of his father, David A. Emery, and for the purpose of showing the assets and liabilities of said estate, and for giving such other information as might be necessary for completely reporting his administration of said estate. The citation was served by Consul-General Fowler upon said Emery in due course, whereupon said Emery came to Shanghai, arriving here on the afternoon of August 12. On August 16 respondent Curtis undertook to appear in this court for said Emery and the court refused to hear him because he was not a member of the bar of the court, never having complied with the rule of the court relating to the admission of attorneys to the bar. On the 21st day of August the court issued a citation to said Emery, which, after showing that he had been cited to appear before the court on the 12th day of August and having failed and neglected to appear in accordance with the citation and having failed to furnish the court with any good reason for so doing, directed him to appear on the following day, August 22, to show cause, if any he had, why he should not be punished for contempt.

The record also shows that respondent George F. Curtis appeared in court on August 21, and again undertook to represent Mr. Emery. On August 22 respondent Emery appeared in court and gave his testimony in response to the above-mentioned citation, at the conclusion of which the court directed the clerk to issue a citation to respondent Curtis requiring him to appear on the following morning at 10 o'clock to show cause why he should not be punished for contempt of court by reason of his having attempted to appear in court in the capacity of an attorney in violation of the rule and order of court relating to the admission of lawyers to its bar. Respondent Curtis, who was in court, immediately rose and stated that he had been present in court and heard respondent Emery's testimony, and that he was ready to appear and explain his conduct in connection with the case, and waived service of citation. He was then sworn and made a full statement in regard to his conduct in this matter.

The evidence of Mr. Emery shows that on the third day after his arrival in Shanghai he employed Mr. Curtis to represent him as counsel in the matter of making a full settlement of his father's estate. He testified that he did not know that Mr. Curtis was not a member of the bar of this court, although he had been apprised of the fact that Mr. Curtis had had some trouble with the court. He testified further that Mr. Curtis did not inform him of the action of the court in refusing to let him appear as counsel and that he did not see an account of the same in the Shanghai daily newspapers. He stated further that he had no knowledge of this fact until he was cited to appear to show cause why he should not be punished for contempt five days thereafter.

Mr. Curtis testified that he informed Mr. Emery at the outset that he was not a member of the bar, and that he also informed him of the fact that the court refused to permit him to appear in his behalf immediately after the event happened. He stated in one part of his testimony that he appeared for the purpose of aiding Mr. Emery in every way he could in the matter as attorney in fact (see record, pp. 7 and 9), and in another part of his testimony he stated that it was his purpose to use this opportunity to test the legality of the rule of court relating to the admission of lawyers to its bar. On this point he testified as follows: "As I understand the rule of court, I could not test the rule of this court to question my right to appear as counsel

for Mr. Emery unless there was some overruling of my right to be here." (See record, p. 9). This is conclusive on the proposition that Mr. Curtis intended to appear in behalf of Mr. Emery as attorney at law and not as attorney in fact. He then went on to show that Mr. Emery had been very ill since he had been in Shanghai, and for this reason he had not appeared in court in obedience to the citation. On the other hand, Mr. Emery gave the court to understand that the reason he did not obey the citation was that he thought he was represented in court by an attorney.

After a careful examination of all the evidence in this case, the court is unable to accept as true the whole of the testimony of either of these gentlemen. In the first place, it is altogether improbable that Mr. Emery would have permitted Mr. Curtis to appear in his behalf as counsel, if he had known positively that Mr. Curtis was not a member of the bar of the court, and had realized that by so doing he would thereby violate a rule of the court. It is also highly improbable that Mr. Emery, who had come here mainly for the purpose of making a final settlement of his father's estate, was not apprised of the fact that his counsel was refused permission to appear in his behalf until five days after the event occurred. While Mr. Emery did not present himself in court or to the American consulate, he was nevertheless in the city of Shanghai from the 16th to the 21st day of August, and was not confined to his room on account of illness during that time.

In view of the foregoing facts, the action of Mr. Emery in not appearing before the court between the 16th and 21st of August is reprehensible, and the action of Mr. Curtis in undertaking to represent Mr. Emery in violation of the rule of court was highly reprehensible. The law of some jurisdictions makes such conduct as Mr. Curtis has been guilty of herein a criminal offense punishable by fine or imprisonment, and the law of all jurisdictions makes such conduct contempt of court. Mr. Emery's reasons for not appearing in response to the citation are not satisfactory to the court, nor does the explanation which Mr. Curtis has given of his conduct convince the court that he was acting in good faith. Furthermore, during these proceedings the attitude of Mr. Curtis toward the court has been argumentative, defiant, and discourteous, as has been his attitude toward the court privately and publicly since his return to Shanghai. The court is not convinced that Mr. Curtis meant to test the court's rule relating to admission of attorneys to the bar in Mr. Emery's case, because both on the 16th and 21st of August he endeavored to file a petition and to make a speech in court on the subject of the wisdom and legality of the rule of court relating to the admission of attorneys to the bar. On both of these occasions Mr. Curtis was informed by the court that if he would file a petition with the court it would receive due consideration. Prior to this time Mr. Curtis had served notice on the court privately of his intention to test the rule of court by mandamus proceedings in the United States circuit court of appeals for the ninth circuit. The records of the court also show that Mr. Curtis was in court on the 10th of June last when an examination was held under the rule; that he did not comply with the rule, but after hearing the questions and answers in open court, arose and asked for an examination, to which the court replied that the examination was concluded, but that if Mr. Curtis would file his application and certificates of character in compliance with the rule they would receive careful consideration. (See Minutes, June 10, 1907.)

In view of the foregoing, the court is forced to conclude that the action of respondent Emery in not appearing in response to the above mentioned citation evidences a disregard, neglect, and disobedience of an order of the court amounting to contemptuous conduct.

The conduct of respondent Curtis in accepting employment as counsel and undertaking to appear in court as such without having complied with the rule of the court, his disrespectful and defiant attitude in court during the proceedings, and his general attitude toward the court both in private and in public since his return to Shanghai in May of this year convince the court beyond a doubt that he meant to proceed in utter disregard of and disobedience to the rule of court, and that his conduct in this matter was intended to be and was in fact contemptuous.

The court therefore finds H. A. C. Emery and George F. Curtis guilty of contempt of court, and sentences the former to pay a fine of $20 United States currency and the latter to pay a fine of $40 United States currency and all the costs of these proceedings; and in the event of their failure to pay said fines within twenty-four hours, the marshal is hereby directed to confine the former for a period of five days and the latter for a period of ten days in the jail of the American consulate at Shanghai.

(Signed) L. R. WILFLEY,
Judge of the United States Court for China.

SHANGHAI, *August 26, 1907.*

NOTE.—At the close of the reading of the judgment Mr. Lorrin Andrews stated that he appeared for Mr. Curtis and would call the attention of the court to the affidavit filed by Mr. Curtis.

AFFIDAVIT.

SHANGHAI, CHINA, *ss:*

G. F. Curtis, being duly sworn, deposes and says:

That he is an attorney and counselor at law, a member of the bar of the Supreme Court of the United States, and of all the courts on record of the State of New York, and that his name is duly enrolled as a member of the said courts in the office of the secretary of the State of New York;

That deponent is also a member of the United States consular court at Shanghai, China;

And by virtue of being a member of said courts, and by virtue of section 5 of the act of June 30, 1906, creating this act, claims to be a member of the bar of this honorable court;

That on the 22d day of August, 1907, deponent was seated in the court room of this court during its session, when one Henry Emery was being examined by this court as to certain private matters;

That at the conclusion of said examination the judge of this court stated that a citation would issue for contempt of court against this deponent, who at that time and throughout the session of said court was sitting quietly in said court room and not making any attempt to address the court or take part in the proceedings;

That upon the judge making that statement deponent came forward and said he was ready to answer to any charge made against him and to give any explanation the court might wish to hear, and

for the account of the subsequent proceedings deponent refers to the report of the official stenographer made of the proceedings of said session and makes the same a part of this affidavit;

That at the conclusion of said proceedings the court stated that a citation would be issued against deponent; that thereafter and in the afternoon of the said 22d day of August, 1907, deponent called at the court room of this court and interviewed the clerk, one F. E. Hinckley, and requested a copy of the citation or the charges against deponent and was informed by said Hinckley that no citation or charges had been filed, and that deponent had better see the judge at the Astor House. Deponent sent his card to the Judge's room and received word that the judge was out; that no citation or charges had been served upon deponent up to the time of the signing of this affidavit; and deponent is unaware of the exact nature of said charges wherein a contempt of court is alleged.

That deponent has practiced law for the last seventeen years, and is utterly unaware of having committed any contempt of court whatsoever.

(Signed) GEORGE F. CURTIS.

Sworn to before me this 26th day of August, 1907.

(Signed) F. E. HINCKLEY,
Clerk of Court.

TESTIMONY AUGUST 22, 1907.

Appearances: George F. Curtis and H. A. C. Emery, each for himself.

Examination by the COURT. Is Mr. Emery in court this morning?

By Mr. EMERY. I am, sir.

Q. Mr. Emery, on yesterday morning the following citation was issued [reads citation]. Now, Mr. Emery, you are called upon to show cause, if any you have, why you should not be punished for contempt of court in thus violating the order of the court. Any statement you may have to make I will be pleased to hear.

A. As soon as I received the citation I came as quickly as I could from Chefoo, so much so that I obtained a special passage by the United States ship *Helena*, as there were no regular ships leaving. This was on the Saturday, and I expected to arrive here, in the usual time, on Monday. Captain Gilmore told me the ship would leave at 10 o'colck and in the ordinary course of things we would arrive on Monday. Unfortunately, we got into a fog, and we had naval maneuvers, taking soundings, etc. I am not a marine man and do not understand such things. But finally we arrived here and got to Woosung, and then the captain said that owing to the tides—whether the tide was with him or against him I don't know—we could not go in. I went to the captain and said: "I have got to get into Shanghai at 2 o'clock. Do you think I could go over and catch the train to Shanghai?"

Q. This was on Monday?

A. Yes, sir. The captain said, "I think you had better wait on board." I saw no chance of catching the train, and we arrived here on that boat, a few hours, five or six, after court. My original intention when I arrived was to consult Mr. Jernigan as my counsel and

to have him take up the matter for me, whatever the case might be. I didn't even know what the matter was about; I knew it was something about my father's or my own estate. He had acted for me before and I meant to ask him to take up the matter for me. When I got here, I heard he was on the point of death. I waited until the second day, I think it was the third day, and I called on Mr. Curtis, and said to Mr. Curtis, "Will you take up the case?" and handed him the papers, and he said, "I will see what I can do." I did not know what Mr. Curtis's attitude in regard to the court was. Since that time I have been confined through illness, and one thing or another. That is my excuse, or, rather, reason.

Q. Mr. Emery, when you approached Mr. Curtis, did not you know that he was not a member of the bar of this court?

A. No, sir; I did not.

Q. Did not he tell you that he was not a member of the bar of this court?

A. He told me only that he had had some trouble with the court.

Q. What did he say?

A. I do not remember the exact words. He said there had been some trouble as regards the court, but that I did not pay much attention to, because I used to read the papers at Chefoo, and it was remarked to me at the time—it was remarked by Mr. Fowler, I think—that Mr. Curtis was appearing. I think he said, "I see that Mr. Curtis appears as attorney without taking an examination."

Q. Did you read the paper yourself?

A. As a matter of fact, I think that Mr. Fowler put it on my desk with that remark.

Q. As a matter of fact, did not you and Mr. Fowler both understand that he was appearing in the particular case of Cunningham *v.* Rodgers as an attorney in fact and not as an attorney at law?

A. I can only speak for myself.

Q. Did you not so understand it?

A. No, sir.

Q. When you came here and asked Mr. Curtis to take up your case, did he mention the fact to you that he had not been admitted as a member of the bar of this court?

A. He said there was some trouble between him and the court; that was all.

Q. Mr. Curtis appeared for you, or attempted to appear for you, in this court on Friday, the 16th. Were you with him in court at that time?

A. No; I was not.

Q. Did the court at that time refuse to permit him to appear in your behalf for the reason that he had refused to comply with the rules of the court relating to admission to the bar?

A. I did not know that.

Q. You did not see that in the papers? That fact appeared in three or four daily papers.

A. I was ill all day.

Q. Did Mr. Curtis thereafter inform you that he was not permitted to appear in your behalf?

A. I think he told me yesterday what it was. The only thing I know was he said there was some trouble.

Q. Did Mr. Curtis tell you that he had endeavored to represent you in this court, and that the court had not permitted him to appear in your behalf? Did not he tell you that before yesterday?

A. No, sir.

Q. You did not know that until you had been otherwise informed of it?

A. No, sir; I think it was your honor told me yesterday.

Q. You had not heard that before?

A. No, sir.

Q. If Mr. Curtis had told you about it you would likely know about it?

A. Yes, sir.

Q. Mr. Emery, as a matter of fact, I understand from your testimony that you arrived here on Monday evening, the 12th, and that you had not so much as introduced yourself to the court, or to any member of its staff, until yesterday afternoon at 4 o'clock.

A. In which way do you mean "introduced?"

Q. By coming and reporting to the court and stating that you were ready to respond to the citation of the court. Of course this was a personal matter on which you were called into court. You had no reason to know that you needed a lawyer.

A. I had the full determination when I came to engage a lawyer, because, in the first place, our leave is limited in the consular service. This is a special leave I obtained. We are only allowed ten days, and as Mr. Fowler intends to go home shortly it was very necessary for me to be represented by counsel, if possible, to save time. That was my full intention. It was my intention to go to Mr. Jernigan; then when I found he was sick, I gave the papers to Mr. Curtis.

Q. And you thought you were represented until the afternoon of the 21st?

A. Yes, sir.

(On the 26th day of August Mr. H. A. C. Emery took oath in open court that he had read the above testimony given by him on the 22d day of August, 1907, and that he found the same to be true and correct. Signed: F. E. Hinckley, clerk of court.)

CITATION TO GEORGE F. CURTIS.

By the COURT. Citation will issue to Mr. George F. Curtis to appear before this court to-morrow at 10 o'clock to show cause why he should not be adjudged guilty of contempt of court.

By Mr. CURTIS. I am ready to appear now.

Q. Mr. Curtis appears in court and waives service of citation. Mr. Curtis, you desire to give evidence on this matter at this time?

A. I am ready to answer any questions the court asks me. I waive service.

George F. Curtis, sworn, testified as follows:

Examination by the COURT. Mr Curtis, you will please state your connection with this episode. Have you been present this morning and heard it?

By Mr. CURTIS. Yes; I have been present and heard every word of it.

Q. You know what Mr. Emery has said, you are fully apprised of the whole situation?

A. Yes.

Q. The court will be pleased to have any statement you may care to make in regard to the matter.

A. I will say that on the morning of the 18th—I think there is some mistake in stating that it was on the 16th—it was on the 19th that I appeared and moved that a special appearance be entered for Mr. Emery.

(The clerk of court consults the records and finds that the date referred to was in fact the 16th.)

Q. Proceed, Mr. Curtis.

A. Then it was on the morning of the 15th, while at breakfast at the Astor House in one of the private rooms—Mr. Emery came in and sat at the table with me, and told me he had come down to appear at some proceedings at court, wished to see Mr. Jernigan and he was sick. He said he had no money, was quite sick—he looked it—and he knew me before in China, in Chefoo, with Mr. Fowler. I was entertained at Chefoo by Mr. Emery. He asked if I could help. I said I will do what I can regardless of the fact you have no money. The court will not permit me to appear; it has ruled that I can only appear as attorney in fact in the Cunningham case, but this is a similar probate case to the Cunningham *v.* Rodgers case; I will go into court and do what I can for you. The question now is as to whether or not the court has a right to demand of me to state the conversations or advice I gave Mr. Emery. I do not hesitate to do so if the court wishes it. I believe it is a privileged statement—statements from client to attorney or from attorney to client—but I may state to the court that I have reason to believe that the court at Nanking, where his father's will was probated—and I was and am of the opinion that this court has no probate jurisdiction except the supervisory control over the consuls in settling the estates under the law. I so stated it to Mr. Emery, but he did not agree with me as to the probate business at Nanking. I told Mr. Emery then that it was useless for me to try to appear for him, that he was of opinion the court at Nanking had probate jurisdiction; then he must admit this court had jurisdiction, because unless he held that if this court was created in July, 1906, the decedent having died in 1905, that this law creating this court could not be retrospective, and that would be a defense to the jurisdiction of the court.

Q. Mr. Curtis, you are in court by reason of the fact that you undertook to appear in court in violation of the rule for the admission of attorneys to the bar of this court. It does not require you to ramble over the whole field. State what your professional conduct and relation was to Mr. Emery and what you did.

A. I started out to tell the court that the communications between attorney and client are privileged.

Q. I did not ask you to communicate what advice you gave him. The point for you to consider is this: That you, in violation of the rule of the court relating to the admission of attorneys to practice before this court, have undertaken to appear here before this court to represent Mr. Emery. The court wants any explanation you may have on that point.

A. My statement of that is this: That I did come up here, as the court is aware, and asked to interpose a plea to the jurisdiction of the

court, and filed a special appearance for Mr. Emery, under protest, for that purpose alone. The court overruled me, and then told me to sit down and I sat down. As I understand the rule of court, I could not test the rule of this court to question my right to appear as attorney for Mr. Emery unless there was some overruling by the court of my right to be here. In the Cunningham case, I was employed by Mr. Edward R. Cunningham in fact before this court was organized. I appeared as an attorney of fact, was not permitted to appear as an attorney at law.

Q. You appeared as an attorney in fact?

A. Yes; I had to appear. Now this case is a parallel case.

Q. Had you any power of attorney from Emery?

A. I had his authorization, not his written power of attorney.

Q. Had you not been informed by the court prior to this that you would not be permitted to appear in any case except the Cunningham case?

A. One minute. I wish to grasp the question fully. The court told me when I first came here——

Q. I don't care about that. You answer the question I gave you. I don't care for the history of the Cunningham case.

(Witness asks for repetition of the question, and stenographer reads as follows: Q. Had you not been informed by the court prior to this that you would not be permitted to appear in any case except the Cunningham case?)

A. I don't recall it.

Q. Have you anything else to say, Mr. Curtis?

A. That afternoon following, after I appeared here, Mr. Emery appeared in my office. He was not well, in fact, was very sick, and has been very sick since. Whether he recalls it I do not know, but I believe other witnesses were present, when I told Mr. Emery the court had refused to permit me to appear for him and that he might see it in the evening papers. I told Mr. Emery that the only thing he could do was to appear for himself or get an attorney. I gave him my opinion on the law of his case. I have seen Mr. Emery quite often since, and almost every time I saw him he was very sick. In fact, he was too sick to come up this morning, in fact was vomiting blood this morning in front of the Astor House, and in fact is so sick now that he is upon the point of fainting. I have acted as best I could for Mr. Emery, have not charged him a cent, and have even assisted Mr. Emery. I know Mr. Fowler very well, intimately. I met Mr. Emery through him, and have done what I could for Mr. Emery as a fellow-man. I have had his statement taken by a stenographer. He came up to my room this morning. He was up there yesterday, and I have come down to the court this morning to brace him up; tried to keep him in position that the court might see him this morning, and I doubted whether he could come to this court this morning—he was vomiting blood. In regard to the contempt, I have not the slightest idea there was any contempt. As I said yesterday in behalf of Mr. Emery and as an amicus curiæ, I would ask that the citation not issue against him, and if the court had given me a chance, I would have told you why he should not come here. I advised him to get counsel; he could not get me as counsel and I advised him to get some one else. When he came to see me several days had already passed; he was due on the 12th, and it seems it was the 15th when he saw me. I have

not the slightest intention of being in contempt of this court or disobeying any of its orders, but on the contrary I intended to petition the court to direct the clerk to file certain cases for which I was attorney at law in the consular court, to which this court is successor, and which I went to Washington in order to get this court established in order to try. My purpose is to get the ruling of the court on these very cases, whether I am entitled to practice in this court.

Q. You may file your petition with the clerk.

A. I was prevented from doing that, but—the court prevented me. I have certain exhibits which I do not wish to file with the clerk. If I filed them with him, I could not get them out when I wanted them, and my purpose this morning was to make a motion that the court would direct the clerk to receive these exhibits one from Secretary Taft and one from Mr. Denby, the present consul-general, and return them in order that I might keep the originals, which I prize very highly, and from the ruling of the court I would not be able to get them out. I believed then and believe now that after the court reads my petition——

Q. Mr. Curtis, the court does not see the bearing that has upon the issue before it. The issue is whether you should be punished for contemptuous conduct toward the court in this, that in violation of the rule of court relating to the admission of attorneys to the bar of this court, with full knowledge, you appeared here and undertook to represent a client. The testimony this morning shows you have involved your client in difficulty and embarrassment. He is before the court to show cause why he should not be punished for contempt. That is the issue, and upon that I will hear anything else you wish to say.

A. I wish to inform the court that there is absolutely no intention to offend this court or its rulings—not the slightest. I try to be as courteous to a man as I possibly can. I never want a man to be more courteous than I am myself. I have been in the Government service a long time and I think I know the law too thoroughly to conduct myself improperly in or out of court, or use language that I would not use in the presence of ladies whom I respected. I have studied legal ethics, I have been brought up in the atmosphere of the Supreme Court of the United States since I was a boy, and this is the first time in my life I have been ever cited to appear for contempt of court. And I disclaim emphatically that there is any intention on my part to antagonize this court, be in contempt, or offend its dignity in the slightest degree. On the contrary, I hold that the dignity of the court is preserved by the dignity of the members of its bar, and those who practice at the same. I have endeavored in this matter to conduct myself with dignity, honesty, and courage. As far as involving Mr. Emery in trouble, I do not believe there is an attorney who would have done more than I tried to do for him out of mere friendship and good will. I can assure the court, as others will, that Mr. Emery has been a very sick man, exceedingly sick, and I did everything I could this morning to stand by him and get him here and see he got into court. I think he will bear me out in every word I say.

And as far as he informing you that I did not tell him that I was not allowed to appear for him in his case, I think he was too sick to recall the facts. I believe, though, that I have the right to appear here under the law of comity that governs the Federal courts and the

Supreme Court. Not since the organization of this Government has a Federal court denied to a member of the bar of the Supreme Court of the United States the right to appear in this court to practice. The Supreme Court of the United States admits members of the highest courts of the States on motion without petition.

Q. The court is familiar with those rules and the reasons for them, but this court has made another rule which must stand until it is revoked by this court or overruled by higher authority. In the meantime the rule, as it stands on the records of this court, must be observed strictly. If you have any further statements to make with reference to these contempt proceedings, the court will hear them, but will not enter into any argument with you on the legal validity of the rule of the court against which you have offended. That is what we want to hear you on. The rule is here and in force and it is your duty to observe it, and if you violate the rules, the regulations provide for a method by which the court may punish you and you are now on trial for a violation of the rule of court and being given an opportunity to make such explanation as you may have.

A. My further explanation is this, that the court has just stated that unless the rule is revoked or the court is reversed, that this rule stands. Now, how can I test the rule?

Q. Never mind how you may test the rule. You must respect it.

A. I have. I have respected the rule and I have been crushed. I have lost thousands of dollars. I have borne it patiently. I have traveled 20,000 miles. I have come out here with the expectation there would be no question of my admission. I was told by Mr. Scott that the court had been written to saying that vested rights of clients were probably infringed by this rule.

Q. One moment, please. We will not pursue that line. Have you anything further on the issue?

A. I will simply say in conclusion I have not the slightest idea there was contempt to come up here and get a ruling. The court did not suggest that I could appear as attorney in fact. I filed no papers to that effect. It was furthest from my idea to offend this court. I know the court is here appointed by the President. There is no appeal except through San Francisco, months of time elapse. I have been very careful not to transgress the rules. If I have done anything which the court considers as contempt, it was done unconsciously. Both my common sense and my self-interest and my respect for the court would certainly prevent me from doing anything that might be considered as contempt in the slightest, and if I could make my remarks stronger, I would certainly do it. I was moved by sympathy for Mr. Emery.

Q. You have gone over all this. If you have anything further, please state it.

A. As far as the present minute, I can't recall anything.

By the court: If there is any good reason you may have, or may hereafter have, or that occurs to you, you may file it with the court, why the court should not punish you for your conduct in this case. I want to give you a full and fair hearing on it. The purpose of the court was to cite you regularly and give you full opportunity; but you were present, you heard the proceedings, and you waived citation, and voluntarily offered to make such explanation, and you have made a full and lengthy explanation. Now the court will take this

matter under advisement and deliver decision at 10 o'clock Saturday. In the meantime, if you have any reasons why the court should not punish you, you may file them with the court.

AFFIDAVIT.

Joseph W. Rice, court stenographer of the United States court for China, being duly sworn, deposes and says that the foregoing and hereto attached pages, numbered consecutively 1 to 15, are a true and correct transcript of shorthand notes taken by him at a session of court on August 22, 1907.

(Signed) JOSEPH W. RICE,
Court Stenographer.

Subscribed and sworn to before me at the city of Shanghai, China, this 28th day of August, 1907.

(Signed) F. E. HINCKLEY,
Clerk of Court.

In the United States court for China at Shanghai, September, 1907, before the honorable L. R. Wilfley, judge.

Toeg & Read v. T. Suffert.

JUDGMENT.

SYLLABUS.

The common law which the statutes of the United States have made enforceable in the courts of the United States in China does not include those portions of the common law of England existing at the time of transfer of sovereignty which have not been introduced generally into the laws of the various States of the Union by being applied and developed by the State courts and the United States courts and incorporated into the statutes and constitution of the States. United States *v.* Biddle, United States court for China, March 6, 1907.

Although wagering contracts were enforceable at common law, they are held not only nonenforceable, but also illegal and void in the United States generally, and therefore are held in the United States jurisdiction in China, nonenforceable, illegal, and void.

A decision of the Supreme Court of the United States holding that a wagering contract is void as being against public policy is binding upon the United States court for China.

The court finds the transaction between plaintiffs and defendant herein a wagering contract, so intended by both parties and bearing unmistakable marks as such. Therefore the contract is void as against public policy.

The court further finds that plaintiffs, as brokers, were privy to the intent of the principal parties. Therefore, on the rule of particeps criminis, though claiming as agents only, they can not recover.

OPINION.

This is a suit brought by Toeg & Read, a firm of stock brokers in Shanghai, against T. Suffert, an American citizen, on a note for 4,949 taels, given in payment of losses sustained by the latter as a result of a transaction in shares on the Shanghai Stock Exchange, in which Toeg & Read acted as Suffert's agents. The history of the transaction, according to the testimony, is as follows:

On the 15th day of April, 1902, defendant gave plaintiffs an order for the purchase of 75 "Farnham-Boyd" shares, which order was

executed by the latter, who paid for the said shares at the rate of 267.50 taels per share. These shares were purchased for the "July settlement." They were sold under instructions from defendant on July 26 at 190 taels per share. The net loss sustained after deducting interest, commissions, and other small items was 4,949 taels. On August 31, 1902, Suffert executed the following note to plaintiffs:

SHANGHAI, *August 31, 1902.*

On demand I promise to pay to the order of Messrs. Toeg & Read the sum of 4,949 taels, Shanghai sycee, for value received.

(Signed.) T. SUFFERT.

Demand having been made upon the foregoing note and payment refused, suit was instituted in this court on said note on May 6, 1907. Defendant in his answer filed herein admits the execution of said note, but denies liability under it on the ground that the obligation in satisfaction of which it was given grew out of a transaction on the Shanghai Stock Exchange, which was in fact and in law a gambling transaction, and for this reason the alleged obligation is illegal and void.

The foregoing facts are undisputed.

The main fact in dispute in this case is whether the transaction was intended to be in the nature of an investment or a settlement on differences. Plaintiffs allege that they were ignorant of defendant's intention in the matter, while defendant contends that it was his purpose to enter upon a purely speculative venture and that this purpose was made known to the plaintiffs at the time the orders were given.

The act of June 30, 1906, creating this court authorizes said court to apply the laws of the United States now in force in the consular courts in China, and, when such laws are deficient, "the common law and the law as established by the decisions of the courts of the United States shall be applied by said court in its decisions and shall govern the same." This court has defined the common law, in the case of the United States *v.* Biddle, to mean the common law of England and the statutes passed in aid thereof which were adapted to the situation of the American colonies at the date of transfer of sovereignty "as modified, applied, and developed generally by the decisions of the State courts and the decisions of the United States courts, and incorporated generally into the statutes and constitutions of the States."

It will be seen from the foregoing that this court will only enforce those principles of the common law which have been introduced generally into the laws of the various States of the Union, and which, in the language of Chief Justice Marshall, "form the substratum of the laws of every State," so that in the case under consideration it will not be sufficient to show what the common-law rule relating to gambling and wagering was at the date of the transfer of sovereignty unless it also be shown that said rule has been incorporated generally into the law of the various States of the Union and applied generally by our State and Federal courts. The act creating this court provides in terms that the law established by the decisions of the courts of the United States shall be applied by this court.

An examination of the authorities will disclose the fact that the rule of law relating to stock-exchange transactions as found generally in

the statutes of the States and as applied and developed generally by the decisions of the State courts and of the United States courts, is clear and well established. Nearly all of the States of the Union have enacted statutes covering this subject, which make trading on the stock exchange on "margins," on "future delivery," or with view to "settlement on differences," gambling contracts, and hence illegal and void.

Great Britain has also enacted statutes on this subject, the most important of which are Sir John Barnard's Act. 7 (George II, chap. 8, and 8 and 9 Victoria, chap. 109, sec. 18.) Sir John Barnard's Act dealt with the "infamous practice of stockjobbing," and was more particularly directed to wagers on the price of stock, or, as they are sometimes called, "agreements to pay differences." This was followed by the statute of 8 and 9 Victoria (chap. 109, sec. 18), which provides "that all contracts or agreements, whether by parol or in writing, by way of gambling or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which should have been deposited in the hands of any person, to abide the event on which any wager should have been made." In interpreting this act, the English courts, while holding that a transaction on the stock exchange with view to settlement on differences was a wagering contract which could not be enforced between the principals, decided that a contract between one of the parties to the transaction and his broker by which the broker incurred liabilities for his principal while acting in conformity to the rules of the stock exchange, was not a gambling contract within the meaning of the law. This was the holding of Mr. Justice Lindley in the case of Thacker *v.* Hardy which is the leading case on the subject. (4 Q. B. D. 685, C. A.)

The American courts, however, have not followed the early English decisions on this subject, but have seen fit to give a different interpretation to statutes of a similar nature, and the modern decisions of the courts of Great Britain which have been brought to our attention indicate that they also are unwilling to follow the rule laid down by the early English decisions. It is certain, however, that the rule of the early English courts has not been adopted generally by the American State and Federal courts. The general rule on the subject has been clearly and succinctly stated by Benjamin in his work on sales, and is as follows:

> At common law wagers which did not violate any rule of public decency or morality, or any recognized principle of public policy, were not prohibited. Since the passing of the above statute (8 and 9 Vict., chap. 109, sec. 18), however, cases have arisen which present the question whether an executory contract for the sale of goods is not a device for indulging in the spirit of gaming which the statute was intended to repress. It has already been shown (ante, par. 78, etc.) that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods nor any other means of getting them than to go into the market and buy them. But such a contract is only valid where the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer. If, under guise of such a contract, the real intent be merely to speculate in the rise and fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the

contract, then the whole transaction constitutes nothing more than a wager and is null and void under the statute.

The Supreme Court of the United States, in a number of decisions, has adopted in terms the rule as laid down by Benjamin, and has carried its application one step further. It has also held that a broker who, in the capacity of agent, represents a trader on the stock exchange may be so connected with the transaction as to render any contract which he may make with his principal illegal and void. The leading cases on this point are Irwin *v.* Williar (110 U. S., 509) and Embrey *v.* Jemison (131 U. S., 344). In the case of Irwin *v.* Williar the court said:

In Roundtree *v.* Smith (108 U. S., 269) it was said that brokers who had negotiated such contracts, suing not on the contracts themselves, but for services performed and money advanced for defendant at his request, though they might under some circumstances be so connected with the immorality of the contract as to be affected by it, they are not in the same position as a party sued for the enforcement of the original agreement. It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is particeps criminis and can not recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction.

In England it is held that the contracts, although wagers, were not void at common law, and that the statute has not made them illegal, but only nonenforceable, Thacker *v.* Hardy, ubi supra, while generally in this country all wagering contracts are held to be illegal and void as against public policy.

In the same case the court made the following observation:

* * * for, as was properly said in the charge, it makes no difference that a bet or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade. It might therefore be the case that a series of transactions, such as that described in the present record, might present a succession of contracts, perfectly valid in form, but which on the face of the whole, taken together, and in connection with all the attending circumstances, might disclose indutiable evidences that they were mere wagers.

The general principle laid down in the case of Embrey *v.* Jemison was that a contract for the purchase of future delivery cotton, neither the purchase nor delivery of actual cotton being contemplated by the parties, but the settlement in respect to which was to have been upon the basis of mere "difference" between the market price and contract price of said cotton futures according to the fluctuations of the market was a wagering contract, and illegal and void as well under the statutes of New York and Virginia as generally in this country. The court also held that the original payee can not maintain an action on a note, the consideration of which is money advanced by him upon or in execution of a contract of wager, he being a party to such contract, or having directly participated in the making of it in the name, or on behalf of one of the parties. (131 U. S., 336.)

The attitude of the State courts generally on the question under consideration is illustrated by the utterances of the supreme court of the State of Nebraska in the case of Sprague *v.* Warren (3 L. R. A., 679) and by the supreme court of Iowa in the case of First National Bank of Creston *v.* C. W. Carroll and wife (8 L. R. A., 275).

In the latter case the court said:

The mere fact that there was specific property about which the transaction occurred would make no difference. Parties may as effectually gamble with reference to actual

property as with reference to the prices of different classes of property. The cases do not turn upon that point, but upon the actual intent of the parties.

The court also approved the following rule of the supreme court of Pennsylvania laid down in the case of Waugh *v.* Beck (114 Pa., 422).

A transaction in stocks by way of margin, settlement of differences and payment of gain or loss, without intending to deliver stocks, is a mere wager.

In the case of Sprague *v.* Warren the supreme court of Nebraska held that—

The rule is well established that when the parties to an executory contract for the sale of property do not intend that the property shall be delivered, but that the transaction is to be settled by the payment of the difference between the contract price and the market price of the article at a time stated, the contract is void.

The court also observed in this case that—

It is the duty of the courts, therefore, where the validity of the contract is challenged, to receive evidence outside of the words of the contract and examine the facts and circumstances which attended the making of it in order to ascertain if possible whether it was intended as a bona fide transaction for the purchase and delivery of property, or merely colorable.

In Barnard *v.* Backhaus (52 Wis., 593) the supreme court of Wisconsin says:

And to justify a court in upholding such agreement it is not too much to require a party claiming rights under it to make it satisfactorily and affirmatively appear that the contract was made with an actual view to delivery and receipt of grain, not as an evasion of the statute against gaming, or as a cover for a gambling transaction.

In view of the foregoing principles of law which have been thoroughly and universally established by the decisions of the courts of the United States, and which have been incorporated generally into the statutes of the States, it is manifest that the fate of this case must turn upon the answer given to the following question: Was it the intention of defendant Suffert and plaintiff Read, at the time the order to purchase the shares in question was given, that said purchase should be for the purpose of investment and for the actual delivery of the shares, or was it understood between the said parties that the contract was made with a view to a settlement on "differences?" The testimony on this point is somewhat contradictory, plaintiff Read stating that he had no knowledge of defendant's intention when the transaction was made, defendant, on the other hand, holding that it was his intention to speculate on the rise and fall of stocks, and that he informed plaintiff Read of this fact on various occasions.

The testimony of Suffert on this point is as follows:

I told Mr. Read, not only on one occasion but on several occasions, that I was buying and selling only on differences, that I had never taken the shares up with anybody else, or intended to. I told him that to protect me, so to speak. (Testimony, p. 33.)

In view of the conflict of testimony on this point, it becomes necessary for the court to examine all the tesitmony produced at the trial of this case and to consider all the circumstances attending the transaction for the purpose of ascertaining the real intention of the parties. The record shows that plaintiff Read met the defendant at the Race Club in 1902, at which time they engaged in a conversation on the subject of trading on the stock exchange. As a result of this conversation it appears that plaintiffs purchased for defendant's account a large number of shares during the six months immediately following. According to Read's testimony, plaintiffs purchased for defendant's account on January 24, 30 "Pulps," on February 17, 60 "Pulps," on

April 15, 75 "Farnhams;" on July 26 he sold 75 "Farnhams." Mr. Read also testified that the "actual transaction upon which this case is based was for the July settlement." (Testimony, p. 4.) The record also shows that plaintiffs submitted statements covering these transactions to defendant Suffert on various occasions, which indicate that all of said purchases were for future delivery.

Eliminating, for the time being, the consideration of the testimony of defendant Suffert on the question of intention, it is hardly reasonable to suppose from plaintiff Read's own testimony that he entertained the view that this transaction was a bona fide one for the actual purchase and delivery of shares. The testimony shows that he knew very little about Suffert at the time the transaction was made, and what he did know was not such as to warrant him in making a large investment on his behalf. He testified on this point as follows:

Q. Did he (Suffert) come to you in the first instance or did you go to him?

A. My recollection is that he first approached me at the coffee table at the Race Club. He gave me an order to buy twenty Langkats.

Q. At that time did you know Mr. Suffert as an operator in shares?

A. I did not know that. He was a member of the Race Club and at that time I believe he had one or two ponies. (Testimony, p. 6.)

On the cross-examination Mr. Read made the following statement:

Q. When you bought these shares, which you allege for Mr. Suffert, had you any knowledge of his financial position?

A. None whatever, except that he was a member of the Race Club.

Q. That is not a very expensive matter.

A. No; but race ponies is.

Q. You bought shares to an amount exceeding 30,000 taels on account of Mr. Suffert?

A. Yes.

There is nothing in the record which goes to show that defendant Suffert was a man of any financial standing in this community, or that plaintiffs had any reason to believe that he was. The testimony also shows that these transactions took place at a time when gambling on the stock exchange was rife in Shanghai. The testimony of Mr. Read on this point is as follows:

Q. You say this was the top of a big boom? You mean in speculation?

A. You can call it speculation if you like.

Q. Buying for a rise?

A. Everybody had been making money.

Q. Over speculating?

A. People had been making money.

Q. Don't you mean by speculating?

A. I admit to a great extent.

It thus appears that the testimony in this case establishes the following facts:

(1) That plaintiffs made and executed the above-mentioned contract, involving the outlay of large sums of money, without any knowledge of the financial standing of defendant Suffert further than that he was a member of the Shanghai Race Club and owned one or two ponies;

(2) That when the stocks in question were purchased for defendant no demand was made upon him for the purchase price of the same; on

the other hand a number of accounts were rendered by plaintiffs covering said transactions, all of which indicate that the parties understood the transaction to be with view to settlement on differences;

(3) That speculating in shares in this community is usually rife, and that the transaction under consideration was made during a period when there was a so-called boom in stocks in Shanghai;

(4) That defendant has testified clearly and specifically that he told plaintiff Read on several occasions that the buying and selling was on differences and that he never had taken up shares with anybody else and never intended to do so with him.

In view of these facts, it is impossible to escape the conviction that the contract in question was made with view to settlement on differences pure and simple and that it was so understood by the parties at the time the contract was made.

We hold, therefore,

First. That the transaction in question which gave rise to the obligation upon which this suit is based was a gambling transaction which, under the law, was illegal and void.

Second. That said plaintiffs herein, acting as brokers for said defendant in said transaction were privy to the unlawful designs of the parties to the contract and aided in bringing them together for the purpose of entering into said illegal agreement, and thereby became particeps criminis, hence can not recover for services rendered or losses sustained by them on behalf of said defendant in said transaction.

The plaintiffs will pay the costs of this suit.

(Signed) L. R. WILFLEY,
Judge of the United States Court for China.

SHANGHAI, CHINA, *September 3, 1907.*

United States court for China.

United States of America v. S. R. Price.

ASSAULT WITH A DANGEROUS WEAPON.

JUDGMENT.

The information in this case charges one S. R. Price with an assault on one A. Jovansen in the city of Shanghai, China, on the 24th day of July, 1906. The information was filed on the 29th day of December, 1906. The case was tried on the 15th day of January, 1907. The testimony in the case disclosed the following facts: A. Jovansen, the accusing witness, was on the 24th day of July, 1906, the lessee and manager of St. George's Hotel, which is located at No. 205 Bubbling Well road, in the city of Shanghai, China. On the above-mentioned date the accused, in company with one Mrs. Anna Stewart, entered the main dining room of the hotel and ordered refreshments. Whereupon the waiters, who were Chinese boys, told Jovansen, who was in the pantry of the hotel, that the woman was "not a fit person to be served."

No. 1 dining room boy testified that he had formerly been a servant in the Astor House Hotel, Shanghai, where he had known said Mrs. Stewart when she was a boarder at the said Astor House before, and that she was "not a proper person." Jovansen upon receiving this

information instructed the boys not to serve the parties. Price, upon learning the reason why they were not served, went to the rear of the hotel and found Jovansen in the pantry.

Price testified that he approached Jovansen and said, "'Jovansen, what is the matter with you?' I told him he was absolutely wrong, he persisted in being impudent and forward, and so I told him that if it were not for making a scandal I would punch the top of his head off, or words to that effect. I told him he was crazy." Price then returned and sat down by his companion.

After waiting for a time and finding that the refreshments were not forthcoming, the said Mrs. Stewart proceeded to the rear of the hotel, where she entered the barroom and after cursing and abusing the Chinese boys, entered the pantry where Jovansen was and began swearing at him.

Mrs. Stewart in her affidavit filed in this case states that she took the matter up with Jovansen herself. Her language is as follows: "Anna Stewart, being duly sworn according to law, deposes and says: During her stay in Shanghai in July, 1906, through a mutual friend, she made the acquaintance of S. R. Price, esq., at the Astor House Hotel. In the afternoon of July 25, A. D. 1906, the said Price drove her out to Siccawei, where he wanted to try some revolvers (two) which he had just purchased. That having tried the revolvers in question, they stopped at the St. George's Hotel to have some refreshments; these, however, were refused them, and she was aware that Mr. Jovansen for some reason did not wish to serve them. On her going to him for an explanation, which was unsatisfactory to her, she made the assertion that he would regret his action when her husband came to Shanghai, where she expected him to be in a few days."

The dining room boys, the barroom boys, and the house coolie testified that the said Anna Stewart entered the barroom, using very bad language, and approached Jovansen, swearing at him and abusing him for not serving her. Jovansen testified that she went so far as to draw a revolver upon him. The evidence further showed that Price followed her to the rear of the building and entered the pantry where he found her quarreling with Jovansen. Price testified that Jovansen had a bottle in his hand when he (Price) entered the pantry and was ordering the woman out of the room, and stated that Jovansen picked up a knife, which was lying on the table, whereupon Price drew his revolver, and said "Drop that knife." This version is corroborated by the affidavit of Mrs. Stewart filed herein, almost word for word. It is also supported by the testimony of Amerigo Lauro, who was in the hotel at this time, and who happened to glance in the pantry just in time to see Jovansen pick up the knife, and to see Price subsequently draw his revolver.

The following is Jovansen's version of the occurrence:

Q. What happened when he came to the hotel?

A. My No. 1 boy was in charge of the dining room and said to me "No good, no can." I said "What is it?" I had given the boy instructions that no ladies of ill fame should be served in my place. The boy came from the Astor House, and he said he knew the lady. I told him to ask Mr. Price to take the lady to another place in the greenhouse; he said he would not; the boy said "the manager says 'no can.'" He insisted on being served and wanted to see the manager. The boy said "No can, manager no have." The lady came

into the barroom where she had seen me and began to use bad language toward me. I said nothing, but kept quiet. Mr. Price came from the dining room through the pantry and said "What is up here?" Mr. Price began to use bad language, called me all kinds of names, insulted me as much as he could. I kept quiet; I said he was to take her to his own place as I wished to keep my place respectable. He kept on insulting me and said "Will you serve me or not?" He pulled out a revolver; I got frightened; then the lady came and also pulled out a revolver—two against me. So I got hold of the table, got my hand on a bottle, dropped the bottle hiding myself under the table; I screamed for assistance.

Jovansen's testimony is supported in all its essential features by the testimony of Tung Yang, No. 1 coolie at the hotel, of Ah-Dow, barroom boy, of Chang Zsouisung, No. 1 bar boy, and of Foh Sun, the No. 1 dining room boy. The Chinese boys did not see the woman draw a revolver, but they all testified that Price was the aggressor; that Price entered the pantry threatening Jovansen and undertook to draw from his hip pocket a revolver, which fell to the floor. He immediately picked it up and pointed it at Jovansen's face, and, at the same time cursing Jovansen and calling him bad names. All of the Chinese boys testified that Jovansen had neither a bottle nor a knife in his hand, but that in his fright he knocked the bottle over and spilt on his clothes the oil it contained. The testimony also showed that after the occurrence terminated Price and the woman left the hotel, and upon the request of the woman Price gave her his revolver. The policeman thereafter found another revolver in the carriage. The two revolvers are before the court as exhibits in his case. The testimony indicates that the revolvers were not loaded at the time of the occurrence. This is substantially the testimony in the case.

In order to give proper weight to the evidence before the court, it is necessary to take into consideration the circumstances surrounding the case, the manner and disposition, as well as the character and interests of the witnesses. The trial disclosed the fact that Jovansen is an ignorant, timid man of excitable temperament. The accused and his companion are intelligent persons, and it can hardly be said that they are of a timid or retiring disposition. Jovansen remained in the pantry during the entire episode, and pursued the natural, reasonable, and proper course. On the other hand, the accused and his companion upon being apprised why they would not be served, proceeded to the rear of the hotel and picked a quarrel with Jovansen. Under all the circumstances, it is highly improbable that Jovansen offered any serious resistance. Had Jovansen been a bold, rough man, and had he proceeded to the dining room where the accused was sitting and ordered him and his companion off the premises in an ungentlemanly manner, then there would have been some warrant and reason for the attitude which Price says he took in this matter. The testimony of Signor Lauro is so meager, and yet so specific and certain on the point it covers, as to deprive it of weight.

Taking into consideration the evidence adduced at the trial, the manner, character, and interests of the witnesses, and all the circumstances surrounding the case, there is no doubt in the mind of the court that the accused, S. R. Price, and his companion, Mrs. Anna Stewart, became incensed at the action of the servants of St. George's Hotel in refusing them refreshments, and that said Mrs. Stewart took

the matter in her own hands, and proceeded through the bar-room to the pantry, where she quarreled with Jovansen, and that thereupon the accused followed her and took up her quarrel and, without provocation or justification, drew his revolver and pointed it at the face of Jovansen, abusing and threatening him and putting the said Jovansen in great fear of bodily harm.

The fact that the revolver was unloaded does not change the aspect of the case. It is a well-settled principle of law that "There is no need for the party assaulted to be put in actual peril, if only a well-founded apprehension is created, for his suffering is the same in the one case as in the other, and the breach of the peace is the same. To illustrate: If within shooting distance one menacingly points at another with a gun, apparently loaded, yet not in fact, he commits an assault the same as if it were loaded. There must be some power, actual or apparent, of doing bodily harm, but apparent power is sufficient." (Bishop's New Criminal Law, vol. 2, sec. 32). In a Scotch case, the judge in delivering the judgment of the court, used the following language: "The presenting of a pistol, even if it were not loaded, providing the party at whom it was presented supposed it to be loaded, was undoubtedly in law an assault." (Morrison case, 1 Broom, 394, 395.) It is not the secret intent of the party, nor the undisclosed fact of his ability or inability to commit a battery that is material, but what his conduct and the attending circumstances denote at the time to the party assaulted. If to him they indicate an attack, he is justified in resorting to defensive action. It is the outward demonstration that constitutes the crime.

The court therefore adjudges the said accused, S. R. Price, guilty as charged in the complaint, namely, that on July 24, A. D. 1906, in the city of Shanghai, China, with a dangerous weapon, to wit, a .32-caliber automatic Colt's revolver, in and upon one A. Jovansen, did willfully make an assault by pointing the said revolver at the said Jovansen in a threatening manner, and by so pointing the said revolver at the said Jovansen did put the said Jovansen in great fear of bodily harm contrary to law; and sentences said S. R. Price for the commission of said crime to six months' imprisonment in the jail of the American consulate at Shanghai; said sentence to begin on the 18th day of January, 1907.

(Signed) L. R. WILFLEY,
Judge of the United States Court for China.

SHANGHAI, *January 18, 1907.*

United States court for China.

United States of America v. C. A. Biddle, obtaining money under false pretenses.

JUDGMENT.

Mr. A. Bassett, district attorney, prosecuted, while Mr. Hays, of Messrs. Ellis and Hays, appeared for the defense.

The information in this case charges C. A. Biddle with obtaining under false pretenses 3,000 taels from Woo Ah Sung, Zung Yu Dong, Ng Sih Yieh and Sz Yung on or about October 31, 1906, in Shanghai, China.

The undisputed facts in this case are as follows:

On the 24th day of May, 1906, said C. A. Biddle received from the municipal council of the international settlement, Shanghai, a communication informing him that Chinese gambling would not be allowed in the future in Shanghai. Five days later, on May 29, said C. A. Biddle entered into a contract with a company called the Yik Che Company, made up of the four Chinese named in the information in this case. Said contract reads as follows:

> Contract entered into between C. A. Biddle and Yik Che, whereby the said C. A. Biddle agrees to let during the four days of the autumn race meeting of 1906, the whole of the second floor and veranda of the building, Nos. 4 and 5 Mohawk road, for the purpose of running Chinese tables, for the sum of 6,000 taels, fifteen hundred taels of which to be paid on the signing of this contract by the said Yik Che as bargain money, the balance to be paid on or before the 1st day of November, 1906.
>
> This contract to be null and void should the municipal authorities prohibit the running of the said building as a Chinese grand stand during said race meeting and the above-mentioned fifteen hundred taels bargain money to be returned to the said Yik Che.
>
> Signed at Shanghai, this 29th day of May, 1906.
>
> (Signed) C. A. Biddle.
>
> Witness—(Chinese chop).
>
> This contract includes one thousand invitation tickets for the four days of the above-mentioned race meeting.
>
> (Signed) C. A. Biddle.

The bargain money, 1,500 taels, was paid at the time of the signing of the contract and the balance was paid during the following October. The 3,000 taels, referred to in the information, was paid between October 26 and November 1. This 3,000 taels was in payment of the final amount called for in the above-mentioned contract. No portion of the money received by Biddle under the contract had been returned to the Yik Che Company at the date of filing the information charging him with the crime of obtaining money under false pretenses. On the 31st of October the accused addressed a petition to the municipal council asking for a confirmation or a revocation of its previous order prohibiting Chinese gambling, and in response thereto on November 1 he received a reply confirming the previous order of the council. Among the witnesses summoned for the defense was Mr. E. Jenner Hogg, of Shanghai, the owner of a plot of land near the Hotel Metropole, which land he had rented to Chinese during the race period for a number of years. Mr. Hogg had entered into a contract with certain Chinese to rent his property for Chinese gambling during the autumn races of 1906. On the 26th day of October, Mr. Hogg telephoned Mr. Leveson, secretary of the municipal council, on the subject of the resolution passed by the council prohibiting Chinese gambling. On or about October 26, Mr. Murray took the accused to see Mr. Hogg on the subject of the telephone conversation, and Mr. Hogg told him that he had taken the matter up with the council and had been informed officially that Chinese gambling would not be permitted. After receiving this information, the accused accepted the 3,000 taels referred to in the information. Chinese gambling was not allowed during the autumn races. The defense has relied upon the proposition that this whole transaction was entered upon and executed in good faith by Mr. Biddle, without any intention on his part to swindle or cheat the Chinese in question or to obtain their money under false pretenses. In support of this contention four witnesses have been introduced to testify on four points.

The first was the accountant, Mr. Leake, who introduced the books of the Hotel Metropole Company for the purpose of showing that this transaction was between the Hotel Metropole Company and the Yik Che Company, and that the money collected had been paid into the treasury of the hotel company. The books were produced in evidence and a casual examination of them showed that there had been an erasure and a subsequent entry in ink of the amount of money involved in the transaction on which this prosecution is based. It is evident that the entry was not made in the usual course of business. The natural inference one would draw from an examination of the books is that the entries were made for a special purpose, and that the money was passed in the treasury of the company as an afterthought if, indeed, it entered it at all. Mr. Von Bibra, the assistant manager of the Metropole, was put on the stand to testify as to what action the company took in this transaction. He stated that he was present at the meetings of the board of directors of the company and kept a record of the minutes of the board. No communication on the subject of this contract between Biddle and the Chinese was made for nearly six months after it was signed, and the board never ratified the contract. The records of the board showed that on November 3, 1906, it considered a communication which had been received from the municipal council on November 1 relating to the prohibition of gambling on the hotel premises and in the Mohawk road building, which had been leased from the Shanghai Race Club by Mr. Biddle and subsequently rented to the Yik Che Company for Chinese gambling purposes during the autumn races. Mr. Von Bibra stated that the records of the meetings of the directors of the Hotel Metropole Company contained no mention of the contract with the Chinese, and no mention of a receipt of money under the contract or of a proposition to return the money that had been paid pursuant to the terms thereof. The conclusion is that this contract was between Mr. Biddle personally and the Chinese, and not between the hotel company and the Chinese.

A woman by the name of Eleanor Stevens was next introduced to show that the Chinese understood the situation at the time the contract was entered into. She stated that she was a single woman; that she took her meals at the Hotel Metropole, and that she was a special friend of the accused and had been dining with him privately in a private dining room of the Hotel Metropole for over a year. She stated that one of the parties to the contract approached her on the subject of inducing Mr. Biddle to enter into a contract with them. That thereafter, on a certain evening, in one of the private dining rooms of the hotel, when no one was present except herself, the accused, and a Chinese boy who was a member of the Yik Che Company, the following conversation took place:

A. Mr. Biddle said to the No. 1 boy that he had received a letter from the municipal council in regard to gambling and they might make "bobbery" (trouble), but he did not think so.

. The No. 1 boy smiled and bowed in a way that looked to me as if he did not think so.

Q. It is quite distinct in your recollection that Mr. Biddle told this No. 1 boy he had received a letter from the municipal council?

A. Yes; it is.

On cross-examination the fact was discovered that only that part of the conversation of the evening which related to the contract between Biddle and the Yik Che Company was recalled by witness.

She remembered this part of the conversation, however, and was able to reproduce it in exact terms, word for word. The language of the witness on this point corresponds exactly with the testimony of the accused. In view of the character of the witness as disclosed by the evidence and by her appearance on the stand, and the circumstances surrounding the case, the testimony of this witness is entitled to no consideration. It is clearly manufactured for the occasion. The only feature of the transaction which tends to show that there was any question in the minds of the parties to the contract on the subject of the prohibition of Chinese gambling is the clause in the contract which provides for the return of the money in the event gambling was prohibited before the date of the autumn races. While this might have been inserted in the contract by Biddle in good faith, it might on the other hand have been put in for the purpose of allaying any apprehensions which might have arisen in the minds of the Chinese. The latter course would not be inconsistent with the theory that his purpose was to swindle and cheat the Chinamen from the outset. The purpose of the accused, however, was disclosed by his subsequent conduct. It appears from the mouth of his own witness, Mr. E. Jenner Hogg—and it must be said that Mr. Hogg gave the appearance of being a straightforward, truthful man—that about October 26 he had received a communication from the secretary of the municipal council to the effect that future Chinese gambling would be prohibited. Mr. Biddle states that between the 26th and 29th or 30th of October he collected the last 3,000 taels of the money called for by the contract in this case. On October 31 he himself took the matter up with the council again, and received on November 1 a final communication from the council on the subject. Nevertheless, during this whole period from October 26 to November 1 no intimation was given by Mr. Biddle to the members of the Yik Che Company of the information he had received from the municipal council on the subject of Chinese gambling, nor did he take any steps to return the money after November 1, the date on which he himself received a final communication from the council confirming its resolution of May 24 prohibiting Chinese gambling in the future. No part of the money was returned at any time. It should be said that Mr. Hogg, upon receiving the information above referred to, immediately canceled his contract with the Chinese tenants and returned the money which they had paid him.

The testimony of Mr. Hogg and the subsequent action of Mr. Biddle put at rest the only question that could arise on the subject of intent. Even if the accused entered upon the contract in the hope that Chinese gambling would be permitted to continue, his subsequent actions demonstrated that he meant to induce the Chinamen to pay the 3,000 taels in question, well knowing that it would be impossible for him to carry on his portion of the contract. The Chinese witnesses testified that he represented to them at the time the 3,000 taels were paid that Chinese gambling would be allowed, and that they relied upon his representations.

In view of the whole of the testimony and of the manner and character of the witnesses, the court is convinced that the testimony of the Chinese witnesses is true and that the Chinese entered into the contract relying upon the statements of the accused, who knowingly made false representations to them for the purpose of obtaining the money in question.

The court therefore finds the accused, C. A. Biddle, guilty of the offense as charged in the complaint, and sentences him to one year's imprisonment in the Shanghai jail.

(Signed) L. R. WILFLEY,
Judge of the United States Court for China.

SHANGHAI, *March 16, 1907.*

MARCH 2, 1908.

SIR: I have received and read your report of February 29 upon the charges submitted by Lorrin Andrews under date of November 19, 1907, against Judge Wilfley, it appearing from your report that Congressman Waldo stands sponsor for these charges. I cordially concur in your finding, which is to the effect that Judge Wilfley is not only innocent, but is attacked solely because of the fearlessness and integrity with which he stamped out vice and crime in Shanghai.

I inclose you a letter from Robert E. Lewis, secretary of the International Committee of the Young Men's Christian Association, who has just returned from Shanghai, China, where he has resided for ten years as foreign secretary of that body. This letter is in line with the quotations contained in your report, and the statements therein made in reference to the character and conduct of Judge Wilfley and his accusers are borne out by the statements of every reputable man, whether business man, missionary, Government agent, or representative of a philanthropic or religious body, who has written to me. It is clear that Judge Wilfley has been attacked not because he has done evil, but because he has done good. The assault on him is simply an impeachment of decency and zeal for the public good, and if successful would tend to cow and discourage every honest public servant who dares to withstand the forces banded together for evil, and would do grave damage to the honor and interest of our country in the Orient. If the attack were to succeed, the beneficiaries would be every keeper of a house of prostitution, every swindling lawyer, every man who lives by blackmail and corruption, in the cities of the Far East. These are the people whose hopes have been revived by the effort to overthrow this upright and fearless judge, who has already done so much for the good fame of America in China. It is not too much to say that this assault on Judge Wilfley, in the interest of the vicious and criminal classes, is a public scandal.

I cordially approve your conclusions.

Sincerely, yours,

THEODORE ROOSEVELT.

Hon. ELIHU ROOT,
Secretary of State.

[Memorandum for Secretary Root.]

IN THE MATTER OF THE CHARGES OF LORRIN ANDREWS AGAINST JUDGE L. R. WILFLEY, OF THE UNITED STATES COURT FOR CHINA.

The within papers contain what purport to be charges against the official conduct of Judge L. R. Wilfley, of the United States court for China, and a request for his removal from office.

They are signed by one individual, Lorrin Andrews. Mr. Andrews is an American citizen and a resident of Shanghai, and a member of the bar of the United States court for China, having taken the examination and qualified under the rule in June of last year.

The petition shows that disbarment proceedings are now pending against Mr. Andrews in the United States court for China.

Mr. Andrews claims to speak for himself and in behalf of various other American citizens who reside in Shanghai, but the papers herein contain no evidence that he has authority to represent anyone but himself.

Since the organization of the United States court for China it has been the practice of the clerk of the court to forward to this Department a complete record of all that transpires in court. The district attorney has just filed with the Department a full statement covering the work of the court for the past year, accompanied by complete copies of judgments and records. Judge Wilfley has also from time to time reported to the Department the situation in China and a full account of the work of the court, so that the Department is familiar with every phase of this work since the date of its organization.

The charges are seven in number and are as follows:

First Charge: The first charge is based on rule of court No. 1, promulgated by Judge Wilfley upon the inauguration of the court in Shanghai in December of last year. The rule relates to the admission of lawyers to the bar, and provides that all American lawyers who wish to be admitted to the bar shall qualify by standing an examination given by the court and furnishing satisfactory certificates of moral character.

Mr. Andrews was in Washington about a year ago and complained against this rule of the court and sought to have it reversed by an act of Congress. He afterwards returned to Shanghai, submitted to the rule, took the examination, and was admitted to the bar.

It has been well settled by the rules and practice of common-law courts that it rests exclusively with the court to determine who is to become one of its officers, as an attorney or counsellor, and for what cause he ought to be removed. (See Ex parte Secombe, 19 Howard, p. 9, at 13.)

In enforcing such a rule Judge Wilfley only exercised the right which in the absence of statute lawfully inheres in all courts of the United States.

The rule adopted was made necessary by the peculiar conditions which confronted the court in Shanghai and other treaty ports in China. For a long time these treaty ports have been favorite resorts for adventurous and irresponsible lawyers. Had the court admitted applicants upon the presentation of certificates of admission from the courts of last resort in the States from which they came or from the Federal courts of the United States all of the American lawyers in China would have been entitled to enrollment. This would have discredited the court at the very outset in the eyes of the Chinese people and of the people of the other Western powers operating in China, and it would have been fatal to its usefulness. Everyone who was familiar with conditions in China knew that there were a large number of American lawyers in the treaty ports of China when the court was organized who by reason of their lack of knowledge of the law and lack of character were not fitted to perform the duties of

the office of attorney at law. It has been suggested that they might have been admitted and afterwards eliminated by disbarment proceedings. This course, in addition to discrediting the court in the eyes of the people, would have taken years of its time and would have yielded unsatisfactory results.

Complaint is also made that lawyers of other nationalities were admitted to the American bar without examination. This was done as a matter of courtesy. The American court has no jurisdiction over attorneys of other nationalities and does not license them to practice in China. Instead of requiring foreign practitioners to ask permission to appear as counsel every time they had a case in court they were simply enrolled permanently. Their names may be stricken from the rolls any time without disbarment proceedings. This rule enables American lawyers to practice in British and other foreign courts without taking an examination and on the whole operates advantageously to them.

Mr. Andrews states that he and his partner had pending in the consular and other courts at Shanghai some 30 cases at the time the court was organized. This statement is not borne out by the records. The records of the courts at Shanghai show that on the 2d of January, 1907, the date of the opening of the first term of the court, the firm of Brooks & Andrews were counsel in two small civil cases and one criminal case in the United States court for China, and were counsel of record in no case pending in the Shanghai consular court. The criminal case was for assault and the civil cases were afterwards dismissed.

The court is also charged with refusing applicants permission to see their papers after the examination closed. The judge had a perfect right to do this if he saw fit, but as a matter of fact no such course was pursued. The examination papers have always been available to applicants, and the records show that one of the rejected lawyers has applied for and taken copies of his answers given at the examination.

Under the rule examinations are held every six months in Shanghai, and examinations have also been held in Hankau and Tientsin. The records show that during the year the court has been in operation 15 American lawyers have applied for admission to the bar, 6 of whom have been rejected, and 9 have qualified. One of the most significant results of the establishment of the rule has been that a number of the worst lawyers in China have been deterred from applying for admission at all. On the other hand young men of unquestionable character of other jurisdictions have been encouraged to come to China to engage in the practice of the law.

Second Charge: The second charge states that Judge Wilfley has permitted Mr. Arthur Bassett, district attorney for the United States court for China, to act as counsel for private parties in several cases. This Mr. Bassett had a perfect right to do under the law, and in doing this he followed the practice that is universal in the United States. However, Mr. Bassett only took civil business for the period of three months after the court was organized. Since that time, inasmuch as complaint was made and because his official duties have demanded all of his time he has declined all civil business that would take him into court.

Third Charge: The third charge states that Judge Wilfley has charged the petitioner and other members of the former Shanghai bar with being disreputable practitioners and unworthy to practice

their profession, and has urged the publication of articles in the public press which said judge knew to be false and untrue. This charge relates to conduct that is wholly unofficial. Judge Wilfley has repeatedly informed the Department in writing that he has not in any way attempted to influence the attitude of the newspapers with reference to the work of the court. That he has made the statement in private conversation that a large part of the former Shanghai bar was unworthy to practice their profession is probably true. It is highly improbable that he made that remark about the petitioner herein, because the records of the Department show that the case of Lorrin Andrews has received the most careful consideration of the court from the beginning.

Fourth Charge: The fourth and main charge contained herein states that Judge Wilfley has instituted disbarment proceedings against the petitioner, Lorrin Andrews, and has cited him to show cause why he should not be punished for unprofessional conduct. The petition shows that these proceedings are now pending in the United States court for China. In view of this fact and the further fact that these proceedings are of purely judicial character it would be highly improper for the Executive branch of the Government to interfere or express an opinion in regard to the merits of the matter. There can be no doubt that it is the right and duty of the court to institute such proceedings against any member of its bar where the facts warranting such a course are brought to its attention. Mr. Andrews complains that he was denied immediate hearing in this case. The records show that Mr. Andrews was responsible for the delay of which he complains. In his answer to the charge he demanded that he be confronted with the testimony of one Bert Schlesinger, of San Francisco, Cal., before he be disbarred on the charges contained in the citation. In response to this demand the court ordered that a commission issue for the taking of the deposition of said Bert Schlesinger. It is the taking of this deposition that caused the delay that Mr. Andrews complains of.

Fifth Charge: The fifth charge states that Judge Wilfley was guilty of irregularities in three matters which came before the court for judicial determination as follows:

First. It is claimed that in June of last year an order was issued commanding an American citizen to appear before the British supreme court at Shanghai and submit to the jurisdiction of that court, contrary to his rights under the law. The facts in this matter are as follows: The British supreme court at Shanghai, in two actions before it, to declare one J. Beavan, a British subject, a bankrupt, having affidavits that said Winklebach, representing himself as manager, had possession of much building material for said Beavan, requested the United States court for China to issue a summons to answer in said actions to be served upon said Winklebach. The clerk of the court, in conformity with the usual custom which prevails among the courts in the international settlement at Shanghai, issued the summons to Winklebach in response to the request of the British supreme court. It was done as a matter of courtesy and comity. It frequently happens in Shanghai that in the trial of cases it becomes necessary to subpœna citizens of other nations as witnesses, and since the courts of one nation have no jurisdiction over the nationals of another

it becomes necessary to apply to the court of the nationality of the foreign witness, and ask that it subpœna the witness desired. This is invariably done as a matter of comity. The act here complained of was done by the clerk of the court in the usual course of business and was never brought to the attention of the court, nor was any complaint ever made by Mr. Winklebach to the court on account of the clerk's action.

Second. The second matter referred to in charge five relates to the appointment of a receiver for the institution known as the "Owl Grill Restaurant," which was operated by one R. F. Daly. The petition seeks to make the point that Daly was not given an opportunity to have his case properly presented in court, and that his property was taken without trial, and that he was turned out into the streets penniless. The records show that Daly was present when the court heard the application for the appointment of a receiver, and that the court inquired with great care into all of the facts of the case before the receiver was appointed. The receiver was put under a heavy bond. Thereafter there was another complete hearing in which the whole matter of the relationship between the parties in interest was gone into by the court. The records show that after the receiver was appointed Daly was represented by the law firm of Jernigan and Fessenden, and that the work of the receiver and the winding up of the business of the concern received the constant and careful consideration of the court. The records also show that after the business was wound up Daly appeared in court in person and by counsel and stated that the final settlement had been made in a manner altogether satisfactory to himself, and he signed a document to that effect. This statement was made in open court by Daly himself.

Third. The third matter referred to in charge five is that in the case of Getz Brothers *v.* Friede, Friede was not given an opportunity to be heard. The records in this case show that Friede was represented by a British attorney by the name of Home. Friede did not appear at the trial, but left China before the case was called for hearing. His attorney appeared and asked for a continuance on account of the absence of his client. The court after hearing the argument overruled the motion for continuance on account of the fact that the agent of the Getz Brothers had come to Shanghai and remained there for a long period at a great expense for the sole purpose of giving testimony in this case. The testimony of the representatives of Getz Brothers was taken by the court. A commission for the taking of the testimony of Friede, who was then in the United States, issued upon the completion of the taking of the testimony of the Getz Brothers. A transcript of the defendant's testimony was made out and copies furnished to counsel for both plaintiff and defendant. The plaintiff was notified by cable of the foregoing facts and his cable replies show that he received the notification. The place for the taking of Friede's deposition was fixed at St. Louis, Mo., because that city is situated about half way between New York, the home of Friede, and San Francisco, the home of the Getz Brothers. Friede did not avail himself of the opportunity to give testimony in this case, but left the United States for Europe before the date set for the taking of his testimony. The records also show that the judge himself informed Friede in Yokohama in July, 1906, that his case against Getz Brothers would be heard in the following November or December. It thus

appears that Friede left the Orient knowing when his case would be called for trial at Shanghai, and that he left the United States after he had full information that the commission had been issued to enable him to give his testimony in St. Louis, Mo. It should be noted in this connection that these cases are judicial matters in which error or mistakes on the part of the court are reviewable by the United States circuit court of appeals for the ninth circuit.

SIXTH CHARGE: The sixth charge complains that the court disregarded the rights of an American citizen by the name of Price by refusing him bail after conviction and pending appeal. The facts in this case are these: S. R. Price was convicted on the charge of assault with a deadly weapon and sentenced to six months in the Shanghai jail. His attorney gave notice of appeal and asked that Price be released on bail. The appeal was granted and bail refused. It is this action of the court to which exception is now taken.

The records show that the court was of the opinion that the appeal was based on frivolous and unsubstantial grounds and taken for the purpose of delaying and defeating justice, and it thereupon exercised the right given it by the law creating the court to modify the rules of procedure then in force. The act establishing the court provides that the procedure already in force in the consular courts shall be the procedure in the United States court for China, provided, however, "that the judge of the said United States court for China shall have authority from time to time to modify and supplement said rules of procedure."

Section No. 66 of the regulations of the minister, which was in force on the date of the organization of the court, is as follows:

> Section 66. After conviction and appeal the prisoner may be admitted to bail only by the minister.

This rule was modified to read as follows:

> After conviction and appeal the prisoner may be admitted to or refused bail in the discretion of the court.

The intention of Congress in this matter is evident by section 4095 of the Revised Statutes of the United States, which is as follows:

> When any final judgment of the minister to China or to Japan is given in the exercise of original or of appellate criminal jurisdiction, the prisoner charged with the crime or offense, if he considers the judgment erroneous in point of law, may appeal therefrom to the circuit court for the district of California; but such appeal shall not operate as a stay of proceedings, unless the minister certifies that there is probable cause to grant the same, when the stay shall be such as the interests of justice may require.

It will thus be seen that the ruling of the court refusing Price bail has ample warrant in the regulations of the minister, which have the force of law, and in the Revised Statutes passed in aid of the treaties, and to those who are familiar with the situation in China the reason for this regulation of the minister and the provision of law is not far to seek. A release on bail in China is tantamount to a permanent release. There are no extradition treaties applicable to Americans in China. There is not even authority for returning a fugitive from justice from the United States. When once one escapes from the jurisdiction of the court, which is a very easy matter, there is no way, as the law now stands, to have him brought back. These conditions were known to the minister and to Congress, and this accounts for the regulation of the minister and of the act of Congress upon which the rule of the court was based.

This action has been designated as an outrage and a violation of the rights of American citizens. As a matter of fact, it conforms to the practice prescribed by the statutes in many of the States of the Union at the present time. A celebrated case in point is that of ex-Mayor Schmitz in San Francisco. After conviction he made application to be released on bail, which was refused by the San Francisco courts. Schmitz was kept in confinement pending appeal, and afterwards the judgment of the trial court convicting him was reversed by the appellate court.

SEVENTH CHARGE: The seventh charge states that at the trial of a Filipino by the name of Victorino Torres the judge permitted District Attorney Bassett to act as interpreter. The facts in this case were as follows: Victorino Torres was tried on the charge of raping a Chinese girl. Substantially all of the testimony was taken in English. Occasionally in the course of the trial it was difficult for the accused to express himself in English and he resorted to the use of the Spanish language. This was understood in the main by the judge, who for five years had lived in the Philippine Islands. In a few instances, however, the court was unable to understand the witness clearly, and District Attorney Bassett aided in the interpretation of certain difficult expressions which were not clear to the court. Torres was represented by counsel, who made no objection to this procedure. As a matter of fact, most of the testimony was taken in English.

SUMMARY.

From the foregoing it appears that the salient facts in connection with the so-called charges contained in the within petition are as follows:

First. (*a*) The petition is signed by a single individual against whom disbarment proceedings are now pending in the United States court for China.

(*b*) The petitioner has complied with the rule of court relating to the admission of lawyers to the bar of which he complains and is now a member of the bar of the United States court for China.

(*c*) In enforcing the rule the court acted within its legal rights.

(*d*) The rule in question was made necessary by the peculiar conditions which confronted the court in China at the date of its organization. So many adventurous and irresponsible lawyers had flocked to the treaty ports of China during recent years that had the court admitted all of them to the bar upon the presentation of certificates of admission to the various courts of the United States, it would have had the effect of discrediting the court in the eyes of the Chinese people and in the eyes of the people of the other western nations doing business in China.

(*e*) At the date of the opening of the court the firm of Brooks & Andrews had only two small civil cases, afterwards dismissed, and one criminal case pending in the United States court for China. They were counsel of record for no cases pending in the consular court at Shanghai.

(*f*) Fifteen lawyers have applied for admission to the bar in China, nine of whom qualified. A number of the worst American lawyers in

the treaty ports have been deterred from applying for admission at all, and good lawyers of unquestionable character from other jurisdictions have been encouraged to come to China to practice law.

Second. District Attorney Bassett took civil business for a period of about ninety days after the court was opened. This was permitted by the law and conformed to the practice universally in force in the United States. By reason of complaint having been made and by reason of his heavy official duties he has since refused all civil business that would take him into court.

Third. The third charge contains nothing that relates to the official conduct of Judge Wilfley.

Fourth. The disbarment proceedings complained of by the petitioner which constitutes his real grievance are still pending and are wholly of a judicial nature, hence can not be considered by the executive branch of the Government.

Fifth. The fifth, sixth, and seventh charges relate to the trial of certain causes which have been before the court. The parties in interest in these causes have not signed the within charges, and there is no evidence to show that they are in anywise dissatisfied with the manner in which the cases were disposed of. Furthermore, an appeal lies from all final judgments, orders, and decrees of the United States court for China to the United States circuit court of appeals for the ninth circuit.

Sixth. The within petition in substance is nothing more nor less than a statement of a grievance of a single Shanghai lawyer against the judge of the United States court for China because said judge has cited him to show cause why he should not be punished for unprofessional conduct. Instead of relying upon the judicial determination of the issues involved in said proceedings this is an effort on the part of the respondent to subject the judge to a trial by the executive branch of the Government.

The records show that the other so-called charges contained in said petition are frivolous and without foundation.

To the President:

I return herewith the paper submitted to you by Lorrin Andrews under date of November 19, 1907, entitled "Charges against Lebbeus R. Wilfley, judge of the United States court for China, and petition for his removal from office," together with my opinion thereon pursuant to section 2 of Article II of the Constitution.

A copy of the charges was sent to Judge Wilfley for such explanation or remark as he had to make, but before the paper could reach China he had left for the United States and did not receive any copy of the charges until he reached Washington on or after the 13th of January. On the 30th of January Judge Wilfley handed me a memorandum regarding the charges, a copy of which I transmit herewith.

On the 20th of February, after examining the copies of the records and official reports relevant to the subject, I notified Mr. Andrews that I would consider any further statements or proofs which he wished to submit and would hear any oral statements that he wished to make, on a specified day. He replied, through the Hon. George E. Waldo, that he would be otherwise engaged on that day, without, however, asking that another time be set. Nevertheless, I did set

another day and gave Mr. Andrews notice through Mr. Waldo that I would hear him then, and received a reply that Mr. Andrews's papers were before a committee of the House of Representatives—still without asking for any different time for the hearing. I assume, therefore, that no further hearing is desired, and that the matter is to be disposed of by you upon the papers already presented and the official records.

Stripped of the epithets and expressions of feeling and opinion on the part of the petitioner and immaterial statements which do not enter into the substance, the charges are as follows:

First. That the judge prevented six American lawyers in Shanghai from practicing in the United States court for China by means of requiring them to pass an examination as a condition of admission to the bar of the court.

It appears by the charge and by the official records that at the opening of the court a rule was promulgated providing for an examination for admission to the bar. It further appears by the records that during the first year of the court there were fifteen applicants for examination, of whom nine passed and six failed to pass. It also appears that the petitioner, Mr. Andrews, was one of those who failed on his original examination, but that he was allowed a second opportunity upon which he passed and was admitted to the bar.

I have no doubt of the lawful authority of the judge to establish such a rule. It is one of the inherent powers of courts of justice to determine the way in which the qualifications for membership of the bar practicing before them shall be ascertained. The United States court for China was created by the act of Congress of June 30, 1906, as a court of record, with general original jurisdiction and extensive appellate jurisdiction, and there is nothing in the statute to justify the conclusion that this customary power was withheld. The rule adopted was the same as the rule which is actually in force in a number of American States. For example, members of the State and Federal bars in New York and Pennsylvania can not be admitted to the bar of New Jersey without passing an examination. The same is true of Kentucky, North Carolina, Rhode Island, Louisiana, and Kansas.

I am not prepared to say that the conditions which led to the establishment of the new court for China and with which it had to deal at the outset were not such as to make it for the interest of justice to establish the rule followed in the States I have mentioned rather than some other rule. The judge who was there and knew the conditions, who was charged by law with the responsibility of inaugurating and conducting the court, and upon whom was imposed the duty of determining that question was probably best qualified to determine. Congress can change the rule by legislation, but the President has no authority to review it. Even if you had power to review the decision of the court as to what would be the best rule for that court, and if you were to differ in opinion from the court, it would be idle to talk about punishing the judge because of that difference of opinion.

The second charge is, in substance, that the judge permitted the district attorney to practice in the court without passing the examination.

It would certainly have been very extraordinary if the judge had

refused to permit the district attorney to practice. That officer had been appointed by the President, by and with the advice and consent of the Senate, pursuant to the statute creating the court, to represent the United States in trying and arguing causes in that court.

It appears that during the first few months, when lawyers were few, the district attorney also appeared in private cases. During the latter part of the year his public business seems to have taken up his entire time. I suppose there are few district attorneys in the United States who do not also practice in private cases. There is no legal objection to it and no other objection unless there is interference with the public business. The only exceptions are probably to be found in the large cities, where the public business engrosses the entire time of the district attorneys.

The third charge is that said Wilfley has by spoken and written words and by his actions libeled and defamed the petitioner and the other members of the American bar who failed to pass the examination, and charged them with being disreputable practitioners, and has secured the publication of articles in the public press to the same effect.

This clearly is not a charge of official misconduct, and it is no part of the onerous duties of the President to try libel suits against his appointees. Were it your duty to take cognizance of such charges there is not here any charge to which anyone can be called on to answer in any form. Without a statement of the articles charged to have been written or printed, so that it may be seen whether they were libelous, and so that the person charged may say whether he is responsible for them, and, if responsible, whether he maintains their truth, such a general charge as this is mere aspersion, upon which no action can properly be taken.

The fourth charge is that Judge Wilfley has commenced proceedings to disbar the petitioner upon a charge of perjury in an affidavit filed in the United States circuit court of appeals of the ninth circuit, and that before bringing such proceedings the judge had threatened to bring them in case this petitioner did not dissolve his partnership with one Brooks.

Obviously, the question whether this proceeding ought to have been brought is to be determined in the proceeding itself. The petitioner can not be disbarred for perjury without proof of the perjury and a record of the proceedings against him, and upon that proof and record he will be entitled under the statute to the judgment of the circuit court of the United States for the ninth circuit. The proper answer to such a charge is certainly not by an attempt to remove the judge who directs the proceeding. Judge Wifley informs me that it is not true that the proceeding was preceded by any threat, but whether it was or not, there would seem to be no offense involved in telling the person charged that it was going to be brought, and the judge might well have considered and stated that under circumstances looking toward reformation and good conduct he should refrain from bringing it.

The fifth charge is that the judge misused and abused the powers of the court in three specified proceedings:

1. That he ordered an American named Winklebach to appear before the British court for China in a proceeding pending in that court.

It appears that Winklebach was a necessary party in a case in which the British court had jurisdiction because the other defendants were British subjects. As the various national courts having the same territorial jurisdiction in China can issue process only to their own nationals, it has been common to issue such orders as a matter of comity in aid of the proceeding in the other court. If Winklebach considered that the order was without authority, he could have moved to vacate it and could have appealed. He did neither.

2. That in the case of M. J. Connell & Co. against Daly a receiver was appointed of the defendant's business as a restaurant keeper without granting an adjournment, for which the defendant applied.

3. That in the case of Friede *v.* Getz Brothers & Co. the court refused an adjournment which ought to have been granted and proceeded with the case in the absence of the plaintiff.

Both of these cases are simply cases of the exercise of judicial discretion, clearly within the power of the court, and as to which the parties had the right of review by appeal. Neither of the parties seems to have asked for such a review. The action certainly can not be reviewed in this way.

The sixth charge is that the judge refused to accept bail from the American named Price, convicted of an assault with a deadly weapon, and after conviction and pending appeal.

The judge was quite right in refusing bail, unless he considered that there was probable cause based upon doubt as to the correctness of the judgment. The new court exercises the jurisdiction formerly exercised by the United States minister to China, and as to that jurisdiction section 4095, United States Revised Statutes, expressly provides that an appeal to the circuit court of the ninth circuit "shall not operate as a stay of proceedings unless the minister certifies that there is probable cause to grant the same, when the stay shall be such as the interests of justice may require." The refusal to grant the bail after conviction was in strict accordance both with the letter and the spirit of the law. Whether the judge was mistaken or not in thinking that there was no probable cause can not be determined without a critical examination of the record, but if he was mistaken on that subject that is no ground for removal. The petitioner is mistaken in supposing that bail could be allowed after conviction as a matter of course. It is not so very long since there was no appeal at all from a criminal conviction in the courts of the United States. An appeal is now allowed, and properly so, but it is not yet the law that a conviction means nothing, and it ought not to be the law. This is especially true under the conditions existing in China.

The seventh charge is that the judge permitted the prosecuting attorney, Mr. Bassett, to act as interpreter of the defendant's testimony in a case against one Torres, a Filipino.

There is no charge of any misinterpretation of the testimony or of any error or injustice in the trial. The judge himself had long lived in the Philippines and understands Spanish quite well; the defendant was represented by counsel, who asked for no regular interpreter and made no objection and apparently was quite satisfied to have the assistance of the district attorney in helping the judge to understand his client. Neither the defendant nor his counsel is now complaining. The charge seems to be finedrawn and without substance.

Shortly before the presentation of these charges Mr. Bassett, the

United States attorney, had mailed a report in the ordinary course of his duty, dated November 11, 1907, which has since been received at the Department of State. This report contains an official statement of the facts regarding a large part of the matters referred to in the charges, and I transmit it herewith.

There is a broader view to be taken of this petition as a whole and of the proceedings of the United States court for China, from which the petitioner has picked out certain details for criticism.

There was a reason for the creation of the court, and an urgent reason, in the existence of conditions in Shanghai, and, to a less degree, in other treaty ports of China, discreditable to the United States and humiliating to American self-respect. The foreign settlement of Shanghai is itself a considerable city, with many thousands of inhabitants from all the western nations. In it there is no single tribunal which has jurisdiction for the administration of justice over all its inhabitants. The citizens of each nation are subject to the jurisdiction only of the judicial officers of their own nation and are exempt from interference from the judicial officers of any other nation. As a result of this peculiar arrangement the vice which seems to thrive in the atmosphere of the Orient has long tended to seek shelter under the flag of the country whose administration is the most lax and ineffective. American administration in Shanghai had long been notoriously lax and ineffective, and the gamblers and prostitutes of Shanghai generally flourished under the claim of American citizenship and the protection of American indifference. To such an extent had this gone that prostitutes generally in Shanghai, and, to a considerable extent in the other cities, whether American or not, were called American girls, and the two expressions were practically synonymous.

One of the principal causes urging to the formation of the new court was the necessity of doing away with this disgraceful condition of affairs. The evidence is overwhelming that Judge Wilfley has accomplished this work effectively and thoroughly and has cleared the American name from the disgrace that rested upon it. It was not an easy task, and it could not be done except by the stern and active administration of justice. Such an administration necessarily creates resentment and enmity. The lawyers whose most liberal clients have been the gamblers and prostitutes of Shanghai never complained of the old order of things, but they are now full of bitterness against the judge who has driven their clients out of business, but the decent and virtuous Americans in Shanghai were indignant and humiliated over the former conditions and are now grateful and approving. The situation is clearly and temperately stated in a letter dated September 25, 1907, from Mr. W. W. Lockwood, associate secretary of the Young Men's Christian Association of Shanghai, to the Hon. Charles E. Watson, of Indiana, which was sent to me by Mr. Watson.

Mr. Lockwood says:

> Judge Wilfley faced a very difficult condition of affairs when he established the new court a year ago. Things had been allowed to run loose for so long that there were those who believed that nothing could be done in the way of restraint. But the court was not of this opinion. A further difficulty was that no body of law had been laid down for the guidance of the court, thus rendering the work of the court most difficult and taxing, but an examination of the careful decisions of the court will speak for itself. An even greater witness to the efficient work of this tribunal is the improved condition

of affairs as far as Americans are concerned all over China. The judge's work has been in the face of the determined opposition of the forces of evil in Shanghai and the other places where the court sits on circuit. He, however, has the unanimous support of those who want to see the law enforced honestly and without partiality. The newspapers, both British and American, that speak for the community, have been unanimous in their expression of approval of the court's work.

Rev. James L. Barton, corresponding secretary of the American Board for Foreign Missions, wrote to me from Boston, under date of September 18, 1907, saying:

I have just returned to the office after having spent something like six months in China. * * *

I wish also to express my great appreciation of the work of Judge Wilfley. I was in Shanghai, Tsintsin and Hankow, and saw with my own eyes how his work was saving the good name of America. The repesentatives of other powers spoke to me in high terms of what the judge is doing, declaring that if that work continues they would have to do something of the kind to protect their good names from the stain cast upon them by profligates who claim citizenship for the protection it gives.

I find on the files of the Department a letter sent you by Messrs. Underwood & Underwood. It had been received by them from Mr. Edward H. Foot, manager of their eastern department. He says:

You have very likely noticed the establishment at Shanghai of an American court for China.

As to the need· The reception that I had at Shanghai when I came here before the establishment of the court last year to open our branch office was of this sort. "An American, are you? Well, the Americans furnish us our saloon-keepers and gamblers and run our houses of prostitution. What are you going into here?" This was particularly the attitude of the Chinese, and with others it was assumed that my business was probably something disreputable. Reference to a woman as an American was a distinct reflection on her character.

As to the result: I returned to Shanghai in July of this year and have been here for several months. The attitude of the city toward Americans, and as I have felt it, has not merely changed; it is strikingly different. In no instance this year have I encountered the sneering reception of a year ago. So extended has been the cleaning up or cleaning out of the tough element, considerable of which driven from Manila landed here, that American citizenship in Shanghai is to-day almost a certificate of respectability.

Naturally, Judge Wilfley, who organized this court, has had to meet all sorts of misrepresentation and bitter opposition from the elements whose business and methods he has opposed.

I find also a letter written to you June 11, 1907, by Daniel L. Rader, the editor of the Pacific Christian Advocate, of Portland, Oreg. He says:

Before Judge Wilfley's appearance in China the word "American girl" was a stench and an offense to such an extent that no self-respecting American woman would allow herself to be called an "American girl."

The influence of those who claim to be American lawyers was of the most degrading quality. I am sure I speak advisedly when I say that these men were the greatest hindrance to the promotion of decency and virtue that the American missionaries, both men and women, encountered in the Empire. Judge Wilfley and Attorney Bassett found these conditions prevailing, and which were far worse than anything I can describe, when they arrived in Shanghai.

* * * * * * *

Both Attorney Bassett and Judge Wilfley have gone about their work with a quiet dignity and an honest purpose which have brought honor to the United States Government and credit to our people. I am sure I am speaking within bounds when I say that nothing which has occurred in China in the past twenty-five years has had so wholesome an effect as the stand taken by the officers of the United States district court for the district of China.

Many other similar letters have come to the Department, and there has also been received a memorial communicated to you by a commit-

tee appointed at a public meeting of Americans in Shanghai and bearing the signatures of several hundreds of American residents, among whom I recognized many familiar and most highly respectable names. The memorial says:

We, the undersigned American citizens residing in China, desire to put on record our emphatic approval of the course pursued by Judge L. R. Wilfley in the United States court for China.

He has already done much to drive out of China worthless and vicious characters and to close up disorderly houses. His court is proving a terror to evil-doers, and his high standard of justice is raising American prestige in China.

We urge upon Congress the necessity of providing a suitable code of laws for the guidance of the United States court in China, the present lack of which is a serious handicap to the court.

The official reports to the Department are to the same effect. Mr. Ragsdale, the consul-general at Tientsin, reports:

Now that we have a United States court for China the matter has been taken up vigorously by the prosecuting attorney, and, if not interfered with; the cause of our shame will soon be a thing of the past. Nearly all of the undesirables have either left or will leave very shortly. The gamblers have either closed their places or have sold out, and all the so-called "American Houses" have been closed or passed into the possession of other nationalities.

In this connection I feel it my duty to express my appreciation of the new court. Whatever may have been the criticisms, the court should have the sympathy and support of the Department. The situation demanded such action as the court has taken. In no other way could the long-standing and deep-rooted disgrace be abolished.

Mr. Rodgers, until last summer the consul-general at Shanghai, reports:

I have the honor to report in connection with the arrest and prosecution by the United States court for China of the keepers of American bawdy houses in Shanghai that six have pleaded guilty and been fined $1,000 Mexican. * * * The American inmates of these houses have left or are going, and although some may return or stay, it is well known that the day of the "American girl" as a prostitute in Shanghai is ended. * * *

The prosecution of the American prostitutes has been received in Shanghai with varied sentiment, as was natural to expect. A certain class, which was quite agreeable to allowing America to assume and continue such a burden of odium, is vehement in denunciation, but on the other hand the respectable classes agree that the action of the court is entirely right.

I beg to state in this connection that no such successful outcome could have been reached without the authority and process of the United States court for China.

Mr. Charles Denby, who succeeded Mr. Rodgers as consul-general at Shanghai, reports, under date of September 13, 1907:

It is the determination of the American attorneys in this city who have been affected by the judge's rulings, and some of whom have a deep animosity against the judge on account of action by him against them some years ago in Manila, to make every possible effort to overthrow the court. I wish, however, to confirm the opinion which has been expressed by every reputable American interest in China that the conduct of Judge Wilfley is worthy of the highest praise.

Secretary Taft upon his own personal inquiry during his recent visit to China expressed his opinion in a public speech at Shanghai, which he confirmed in a letter to the Secretary of State. He said:

Our Government was fortunate in the selection as the first judge of that court of a gentleman who had given four years' experience in the Orient as attorney-general of the Philippines, and who came to Shanghai with an intimate knowledge of the method of uniting, in one administration, the principles of the common law of the United States with the traditions and conditions of a foreign country. His policy in raising high the standard of admission to the bar and in promoting vigorous prosecutions of American violators of law and the consequent elimination from this community of undesirable characters who have brought disgrace upon the name of Americans in the

cities of China can not but commend itself to everyone interested in the good name of the United States among the Chinese people and with our brethren of other countries who live in China. It involves no small amount of courage and a great deal of common sense to deal with evils of this character and to rid the community of them. Interests which have fattened on abuses can not be readily disturbed without making a fight for their lives, and one who undertakes the work of cleansing and purifying must expect to meet resistance in libel and slander and the stirring up of official opposition based on misinformation and evil report. I am glad to think that the circuit court for China has passed through its trial, and that the satisfaction which its policy has brought to the American and foreign communities in China and to the Chinese people will not be unknown to the Administration at Washington, at whose instance this court was first established.

All of these evidences have been confirmed by numerous conversations with Americans returning from China who sought the State Department to express their satisfaction over the good work that has been done in Shanghai.

The circumstances thus presented exhibit a motive for the attempt to drive Judge Wilfley from his position. They present a strong probability of misjudgment, exaggeration, and distortion of facts on the part of the lawyers who have personally suffered from the changed conditions. They make it clear that upon no trifling grounds should our Government incur the public misfortune which would be involved in putting the stamp of disapproval on the work for decency and righteousness that the United States court for China has done.

My opinion is that Judge Wilfley is entitled not to condemnation but to commendation and high credit for his conduct in office, and that the charges against him should be dismissed.

Respectfully submitted.

ELIHU ROOT.

FEBRUARY 29, 1908.